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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.,

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a publicly held takeover target did not violate its duty, under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §§78;(b) and 78n(e), to speak the whole truth and not mislead when it stated it was "aware of no reason for the activity in its stock in trading on the NYSE today", when:

(i) the statement responded to an inquiry from the New York Stock Exchange about whether the takeover target was aware of any reason that could explain the extraordinary trading in its stock;

(ii) the takeover target knew of at least two ongoing negotiations which could have explained the extraordinary trading activity; and

(iii) the takeover target made no investigation into the possibility that information had been leaked?

2. Did the Court of Appeals err in holding that there could never be a duty to disclose an agreement to merge until the parties agreed on price and the structure of the transaction, even when these factors were of secondary importance in a particular transaction and there had been agreement on all the significant terms?

3. Did the Court of Appeals err by disregarding this Court's opinion in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), and holding that the materiality of an event, and thus the duty to disclose it, was to be determined from the perspective of the company rather than the perspective of the reasonable shareholder?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Bruce H. Greenfield ("Greenfield"), individually and as a representative of a class of persons similarly situated, prays that a Writ of Certiorari issue to review the August 29, 1984 Opinion and Judgment of the United States Court of Appeals for the Third Circuit ("Third Circuit").

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania granted Respondents' Motion For Summary Judgment on October 20, 1983. Judge Newcomer's Memorandum and Order are reported at 575 F.Supp. 1325 (E.D.Pa. 1984). Appendix "B", at A34. (References to the Appendix are cited as "A ___"). A panel of the Third Circuit affirmed over a dissent by the Hon. A. Leon Higginbotham, Jr. Greenfield v. Heublein, Inc., 742 F.2d 751 (3d Cir. 1984); Appendix "A", at A1. The Third Circuit denied a timely Petition for Rehearing In Banc, with Judge Higginbotham again dissenting. The Order denying the Petition for Rehearing is set forth as Appendix "D", at A97.

JURISDICTION

The Third Circuit entered judgment affirming the district court on August 29, 1984. Appendix "C", at A95. A timely

Petition for Rehearing In Banc was filed on September 11, 1984, and denied by the Third Circuit In Banc on October 1, 1984. Appendix "D", at A97. The jurisdiction of this Court is invoked under 28 U.S.C §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 15 U.S.C. §§78j(b) and 78n(e), are set out in Appendices "E" and "G", at A99 and A101. Rule 10b-5, 17 C.F.R. §240.10b-5, is set out in Appendix "F", at A100.

STATEMENT OF THE CASE

Petitioner in this class action alleges violations of §§10(b) and 14(e) of the Securities Act of 1934, 15 U.S.C. §§78j(b) and 78n(e) [the "1934 Act"], Rule 10b-5, 17 C.F.R. §240.10b-5, and the common law. Greenfield sued on behalf of a class composed of all persons who sold Heublein, Inc. ("Heublein"), common stock in the period from July 15 through July 28, 1982.

The class sold 1,842,200 shares and lost approximately $28,000,000. The defendants below were Heublein and R. J. Reynolds Industries, Inc. ("Reynolds").[1] Federal jurisdiction below was based on § 27 of the 1934 Act, 15 U.S.C. §78aa.

Heublein was the target of a hostile takeover attempt by General Cinema Corp. ("General Cinema"). By May 28, 1982, when General Cinema amended its Schedule 13D filed with the Securities and Exchange Commission to state that it had no present intention of purchasing additional Heublein shares, General Cinema had invested $157,000,000 and held approximately 18.9% of the outstanding Heublein shares. In response to General Cinema's attack, Heublein began friendly merger discussions with

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[1] A third defendant, R.J. Reynolds Tobacco Co., was dropped by agreement of the parties.

Reynolds which had independently formed an interest in becoming Heublein's "White Knight" and acquiring the company.

On Thursday, July 8, 1982, the situation facing Heublein changed radically when General Cinema confronted Heublein with "non-negotiable demands" that were entirely unacceptable to Heublein. Alarmed by this turn of events, Heublein hurriedly scheduled a meeting with Reynolds for July 9 to discuss "putting the two companies together". This meeting was attended by the top executives of each company: Reynold's Chairman, J. Paul Sticht; Heublein's Chairman, Stuart D. Watson; and Heublein's CEO, Hicks B. Waldron.

Heublein considered the July 9 meeting with Reynolds "a fairly important turn of events" and reported to Heublein's executive committee and its outside investment bankers "essentially what occurred". It

was reported that, among the points discussed and agreed, Waldron and Watson would become members of Reynold's board of directors and Waldron would become the head of a combined food division once Heublein and Reynolds merged. Heublein also instructed its investment banker to inform Heublein's outside counsel of these developments. On July 14, Reynolds' management committee was advised of the July 9 meeting with Heublein.

Heublein's desperation increased on July 14 when it learned that General Cinema was about to sell its Miami television station for approximately $100 million. This gave General Cinema the immediate financial capacity to resume large block acquisitions of Heublein's stock, "the one thing" Heublein "knew it could never defend against". In a call to Waldron confirming

the pending transaction, General Cinema impliedly threatened Heublein's independence.

In response, Heublein initiated "accelerated activity" on its remaining option and immediately set up another high level meeting with Sticht. Sticht detected desperation in Heublein's call and, due to the obvious "sense of urgency", agreed to fly to Connecticut the next evening after attending an important congressional hearing in Washington.

At the July 9 and July 15 meetings, the issues critical to Heublein's management were reviewed, negotiated and agreed upon: Heublein was to receive operational autonomy within Reynolds; its executives were to be provided with golden parachutes; Waldron was to become the head of a combined food division once Reynolds and Heublein merged;

and Waldron and Watson were to become members of Reynolds' board. Other less essential terms needed for a final agreement, the "nuts and bolts" such as price and structure, were by agreement left to the parties' lawyers and investment bankers.

While matters progressed between Heublein and its two suitors, there was a sudden and significant change in the market. On Tuesday, July 13, only 32,000 Heublein shares were traded. But, on Wednesday, July 14, 1982, approximately 242,500 Heublein shares were traded on the New York Stock Exchange ("NYSE"), and the stock rose 2-3/4 points. The NYSE called Heublein and inquired about what could have caused the sudden, dramatic surge in trading. Heublein through its General Counsel, George Caspar, Esquire, immediately responded that it was aware of nothing that

would have caused the increased trading; however, Caspar volunteered to check within Heublein to be certain. The NYSE requested that Heublein issue a "no corporate development" statement if it could or should.

Caspar, who had specific knowledge of the Reynolds and General Cinema developments, had not spoken to Waldron or Watson about the activity, gave no thought to consulting them, and made no effort to speak with them before replying. Caspar assumed, without inquiring, that no one at Heublein had leaked or disclosed information about the July 9 meeting, and gave no thought to whether Reynolds had leaked or disclosed such information, or to the effect the General Cinema situation might be having on the market.

After consulting persons who had not been involved in the July 9 meeting, Caspar

called the NYSE and read the following statement which was duly publicized:

> In response to a request from the New York Stock Exchange, Heublein said it's aware of no reason for the activity in its stock today.

Greenfield learned of Heublein's statement and reasonably interpreted it to mean that all was normal at Heublein. Greenfield also concluded that Heublein's stock was fully priced and placed a market order with his broker that ultimately resulted in his stock being sold on July 27 for $45.25 per share, well below the merger price of approximately $60.00 per share announced on July 29.

While Greenfield was selling his stock in the falsely induced belief that it was "business as usual" at Heublein, Heublein was, in fact, resolving matters with both

General Cinema and Reynolds. Heublein knew that no accommodation would be reached with General Cinema and that a final deal with Reynolds would have to be struck quickly to prevent a resumption of block stock purchases by General Cinema. Only the final price and the "nuts and bolts" terms of the Heublein/Reynolds transaction had to be settled because Heublein had already obtained everything it had been seeking at the earlier meetings. Because price was not a key element, the top executives of Heublein and Reynolds did not participate in the meeting between the investment bankers on Monday, July 26. Both sides had internal reports which contemplated a transaction in the range of $55 to $65 per share,[2] but the bankers unexpectedly

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[2] Waldron and Watson both considered $60.00 per share to be "a hell of a price".

failed to reach an agreement on the actual price.[3] Accordingly, on Tuesday, July 27, the executives had another meeting to settle the remaining terms. The discussion on price remained within the anticipated range, and the parties eventually agreed to a composite price of $60.00 per share: the exact middle of the anticipated price range. On July 29, 1982, Reynolds and Heublein announced that a $1.25 billion merger had been approved by their boards of directors.

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[3] One possible explanation was that Heublein's investment banker, Frederick Krimendahl of Goldman Sachs, knew he was losing a major client and was unhappy with the transaction.

REASONS FOR GRANTING THE WRIT

This case raises important questions under the 1934 Act about two interrelated duties which arise in the context of corporate acquisitions: the duty to speak the whole truth and not mislead; and the duty to disclose.

Mergers, takeovers and other types of acquisitions have become a routine feature of American corporate life. A week rarely passes without a major announcement involving hundreds of millions of dollars and affecting thousands of public shareholders. Against this background, Greenfield urges this Court to grant the Writ for two reasons. First, the panel majority's decision is in direct conflict with other circuits regarding the duty to speak the whole truth and not mislead. Second, the opinion addresses important disclosure

issues under the 1934 Act which should be resolved by this Court in a manner consistent with its past decisions, particularly TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976), which the decision below contravenes.

I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS OVER THE DUTY TO SPEAK THE WHOLE TRUTH AND NOT MISLEAD

Prior to this decision, no court in the fifty years since the passage of the 1934 Act had ever limited the inquiry in a misrepresentation case to the literal truth of the statement at issue. The Third Circuit panel decision, which applied this novel, narrow test, is, therefore, in direct conflict with existing law in other circuits, and even with its own prior decisions, on the duty to speak the whole truth and not mislead.

The panel's opinion, by focusing on what was perceived to be the literal truth of

Heublein's statement, ignored both the false impression it deliberately created and the fact that the statement was, at best, a half truth. Judge Higginbotham in his dissent exposed the fallacy underlying this position:

> My disagreement with the majority opinion involves Heublein's breach of its duty not to mislead. This duty applies to any corporate statement reasonably calculated to influence the investing public whether or not a duty to disclose exist. Once Heublein opted, however, to issue a statement that was reasonably calculated to influence the public, the July 14 statement, Heublein was obligated to ensure that its statement was not "false or misleading or . . . so incomplete as to mislead." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1969), cert. denied, 349 U.S. 976 (1969). A21. [Footnote omitted.]

Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied,

404 U.S. 1004 (1971), highlights the error of the limited inquiry conducted by the majority below and confirms the soundness of Judge Higginbotham's dissent. In Mitchell, the Tenth Circuit articulated the standard under which the Heublein press release should have been judged, and concluded:

> The misleading, misrepresented or untruthful character of the release may appear from the nature of the statement alone, or, when the facts are fully disclosed, from the half truths' ommissions or absence of full candor concealed therein. 446 F.2d at 97.

Similarly, the leading commentator on Rule 10b-5 states that both false impressions and half truths are as actionable as outright misrepresentations under the Rule:

> A statement which conveys a false impression to a reasonable investor is a misrepresentation.
>
> A half truth is a statement which accurately discloses some facts, but misleads the listener or reader by

> concealing other data necessary for the true understanding. . . .half truths are usually more difficult to detect than outright lies. . . .
>
> Clause (2) of [Rule 10b-5] prohibits both misrepresentations and half truths, . . .

5A Jacobs, Litigation and Practice Under Rule 10b-5, §61.01[a], at 3-6 to 3-7 (1984) [citations omitted]; see also, id. §61.01[c] [vi] at 3-71 to 3-74.

The panel majority addressed the first relevant question and considered the literal truth of what Heublein said, but then unaccountably stopped. The majority, unlike Judge Higginbotham, acknowledged but never considered the legal effect of what Heublein admittedly knew but did not say: Heublein was aware of at least two ongoing negotiations which could have explained the trading, but made no investigation into the possibility of a leak.

The majority's limited inquiry and the rule it adopted are in total conflict with the substantial and unanimous body of case law which requires a party who speaks at all to speak the whole truth. In Kubic v. Goldfield, 479 F.2d 472, 476 n.7 (3d Cir. 1973), the Third Circuit itself said of analagous Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a):

> . . . the failure to state the whole truth with regard to a security is equally unlawful as the statements of half-truths or deliberate falsehoods. It is the impression created by the statement which determines whether they are misleading. [Citations omitted].*

The other circuit courts that have considered the issue are in total accord, and have uniformly rejected the rule adopted by the Third Circuit majority. See, e.g.,: (1) Panter v. Marshall Field & Co., 646

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* Emphasis added unless otherwise stated.

F.2d 271, 292 (7th Cir. 1981), cert. denied, 454 U.S. 1092 (1982) ("it is also axiomatic that once a company undertakes partial disclosure of such information there is a duty to make the full disclosure of known facts necessary to avoid making such statements misleading.");(2) First Virginia Bankshares v. Benson, 559 F.2d 1307, 1314, 1317 (5th Cir. 1977), cert. denied sub nom., Walter E. Heller & Co. v. First Virginia Bankshares, 435 U.S. 952 (1978) ("a duty to speak the full truth arises when a defendant undertakes to say anything");

(3) SEC v. Geon Industries, 531 F.2d 39, 49-50 (2d Cir. 1976);

(4) List v. Fashion Park, 340 F.2d 457, 462 (2d Cir. 1965) ("10b-5 . . .precludes not only the conveyance of half truths . . . but, as well failure . . . to disclose the full truth").

Similarly, every district court which has considered the issue has rejected the panel majority's position. See, e.g.:

(1) Connellan v. Himelhock, 506 F. Supp. 1290, 1298 (E.D. Mich. 1981) ("10b-5 creates a duty . . . to disclose the full truth");

(2) Marrero v. Banco di Roma (Chicago), 487 F. Supp. 568, 575 (E.D. La. 1980) ("when one undertakes to say anything in connection with a sale of securities, a concomitant duty arises to speak the whole truth");

(3) Smith v. Manuasa, 385 F. Supp. 443, 449 (E.D. Ky. 1974) ("the representations are not ligitimized by the absence of overt misstatements; the antifraud legislation proscribes 'half-truths' whose literal accuracy belies the clarification necessary for an informed judgment");

(4) Speed v. Transamerica Corp., 99 F. Supp. 808, 820 (D. Del. 1951), aff'd with

mod., 235 F.2d 369 (3d Cir. 1956) ("Defendants contention that only express misrepresentations or half-truths are unlawful fails to look at the fact that implied misrepresentation is just as fraudulent").

The decision in Schlanger v. Four-Phase Systems, Inc., 582 F.Supp. 128, 134 (S.D.N.Y. 1984), is illustrative of the approach other courts have taken. Under facts virtually identical to this case, the court denied summary judgment, holding that:

> This Court concludes that defendants, once having chosen to make a statement of fact, had a duty to disclose all material facts "necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading."

While the panel majority specifically recognized that "[the Heublein spokesman], and other Heublein executives, clearly knew of information that might have accounted for the increase in trading" (A 17-18), the majority based its decision on the unprecedented ground that what Heublein said was

literally true because it did not know the actual reason, as opposed to several of the possible undisclosed reasons, for the increase in trading. This analysis was legally inadequate because it did not consider the Exchange's question, what Heublein admittedly knew but did not disclose or the nature of the false impression the company deliberately conveyed.[5]

The question put to Heublein by the NYSE was what could, not what would, explain the trading activity in Heublein's stock. The NYSE-Company Manual, Section A2 Part I, Timely Disclosure: Exchange Market Surveillance (1977), provides in part:

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[5] Heublein's own Guide To Compliance With The Securities Laws provides: "Regardless of the existence of a proper corporate interest in confidentiality of information, inquiries by the regulator agencies such as the [NYSE and SEC] must be answered with candor."

> If the price movement of a stock exceeds a predetermined guideline, . . . the Company may be called by its Liaison Representative in the Division of Stock List to inquire about any company developments which have not been publicly announced but which could be responsible for unusual market activity.

Heublein's statement and the majority's focus were not responsive to the NYSE question. Heublein, despite its answer, was not asked what would explain the activity; it was asked what could explain it. Thus, at trial a jury could easily find that the difference between the question posed and the answer given was a deliberate attempt "calculated to influence the public" to conclude, wrongly, that all was normal at Heublein. Texas Gulf Sulphur, supra, 405 F.2d at 862.

The NYSE specifically sought information that the panel majority conceded Heublein possessed, but which its approach permitted Heublein to conceal. The opinion rationalizes this result by emphasizing Heublein's lack of concrete knowledge, especially of any facts which indicated that there had been a leak concerning the negotiations with either Reynolds or General Cinema.

Again, the NYSE-Company Manual illustrates the fallacy underlying the majority's approach:

> At some point it usually becomes necessary to involve other persons to conduct preliminary studies or assist in other preparations for contemplated transactions . . . . Experience has shown that maintaining security at this point is virtually impossible. Accordingly, fairness requires that the Company make an immediate public announcement as soon as confidential disclosure relating to such important matters are made to "outsiders".

Thus, the Third Circuit held, without citation of a single authority, that a company can, even when, as here, at least ten outsiders have knowledge of what is occurring, act on the assumption that confidentiality has been maintained. The NYSE, with its vast practical experience and supervisory mandate under the federal securities laws, has, however, concluded that maintaining confidentiality is "virtually impossible". The NYSE approaches a company under these circumstances on the assumption that there has been a breach of confidentiality. The majority position, if permitted to stand, will deprive the public of important protections under the federal Securities Acts and the Exchange Rules and permit corporations to deal in half-truth and deception.

Judge Higginbotham succinctly identified the weakness in the majority's approach and the danger it poses to the public:

> If anything the majority's approach subjects the investing public to future voluntary misrepresentations by corporations in the midst of allegedly confidential merger discussions.
>
> So long as they remain unaware of leaks, even though there is information to leak, they can falsely assure the public that all is proceeding at a business-as-usual pace. A 27.

The public had the right to expect that Heublein was asked about possible explanations as called for by the NYSE's manual. If there was a failure to detect the subtle difference in Heublein's response, the burden should fall on the company and not on the public, where the Third Circuit has placed it.

The alternative to the panel majority's approach is obvious and had previously received unanimous judicial support: Heublein could have remained silent or have spoken

the whole truth. Heublein, however, elected to rely on misimpression and half-truth by disclosing far less than it concededly knew. Judge Higginbotham, consistent with the existing law in every other circuit, recognized the fundamental error in the panel's approach:

> . . .[T]he majority fails to distinguish between the duty to disclose and the duty not to mislead. The majority does not appreciate that this dissent stands for the simple proposition that in the face of a NYSE inquiry, Heublein could have remained silent or answered "no comment," but, by virtue of voluntarily issuing its July 14 state- ment, Heublein assumed responsibility for honoring another duty -- the duty not to mislead. A 23.

This Court should resolve the conflict among the circuits and reaffirm its long standing commitment to the broad remedial nature of the Securities Acts by granting the Writ and rejecting this complete departure from established law.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE IMPORTANT QUESTIONS OF WHEN A DUTY TO DISCLOSE ARISES UNDER THE SECURITIES EXCHANGE ACT OF 1934

Delicate corporate negotiations cannot be conducted in a public environment. Consequently, the courts have established a rule, which Greenfield does not challenge, that no disclosure of merger negotiations is required until an "agreement in principle", or its functional equivalent, is reached if the parties maintain silence and refrain from trading. See, e.g., Reiss v. Pan American World Airways, Inc., 711 F.2d 11 (2d Cir. 1983); Staffin v. Greenberg, 672 F.2d 1196 (3d Cir. 1981).

The courts have, however, left open the crucial question of when an agreement sufficient to trigger a duty of disclosure is reached. This vital unanswered question affected two aspects of the present case: the negotiations between Heublein and

Reynolds and the termination of negotiations between Heublein and General Cinema. This Court should grant the Writ and establish a clear but flexible standard that the trier of fact can apply to determine if a discloseable event has occurred.

A. A Duty Of Disclosure Exists When The Parties Have Reached Agreement On The Elements Crucial To a Particular Transaction.

Greenfield has always maintained that Heublein and Reynolds reached a discloseable agreement as early as July 15 and certainly well before he sold his stock on July 27. This position was based on the contention that in this transaction the key elements were not price and structure, but rather the provisions designed to insure Heublein's autonomy within Reynolds and to provide financial protection for its executives.

The district court below rejected this contention, holding that there had to be

"agreement on the fundamental terms of the merger" before there could be an agreement in principle and then establishing a per se rule that these fundamental terms must always include "price and structure". Greenfield v. Heublein, Inc., 575 F. Supp. 1325, 1337 (E.D. Pa. 1983). The Third Circuit, too, placed its emphasis on price and structure:

> . . .Agreement as to price and structure provides concrete evidence of a mature understanding between the negotiating corporations. They constitute a useable and definite measure for determining when disclosures need be made. A 13.

The per se rule recognized by both courts below establishes an irrebuttable legal presumption that there can be no agreement and no duty to disclose absent agreement on price and structure. This rule is too rigid and ignores this Court's past teachings that the federal Securities

Acts must be construed "not technically and restrictively, but flexibly to effectuate [the Acts'] remedial purposes", SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963), to prevent fraud and protect investors. Herman & McLean v. Huddleston, -- U.S. --, 103 S. Ct. 683, 686-690 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195, 202-03 (1976); H.R. Rep. No. 85, 73d Cong., 1st Sess. 1-5 (1933).

While price and structure are of great importance in many merger negotiations, Greenfield's point is that they do not always assume such importance, and that the policies underlying the federal Securities Acts require a standard which can accommodate the exception as well as the more usual situation. It requires little imagination to envision how the rule established below could be employed to manipulate negotiations, and thus the market, by

deliberately delaying consideration of price and structure to accomplish the parties' illegitimate ends. If negotiations are always immaterial as a matter of law and need not be disclosed until there is agreement on price and structure, insiders could reach agreement on the key issues, trade in the affected securities, and then turn to the secondary issues of price and structure after assuring themselves of a windfall.

This Court has never sanctioned judicially created rules which hamper application of the federal Securities Acts to the types of manipulative abuses Congress sought to eliminate. Here, the Court should grant the Writ and set a standard for disclosure that would permit injured shareholders, like Greenfield and the class, to rebut the primacy of price and structure under the specific circumstances of a given transaction.

B. The Panel Misapplied This Court's Decision In TCS v Northway That The Materiality Of An Event, And Thus The Duty To Disclose, Should Be Determined From The Shareholders' Perspective.

In TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976), this Court unanimously held that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important. . . ." This Court further held that the standard for a material omission contemplates:

> . . .a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available. Id.

Despite this Court's holding that the "reasonable shareholder" and the "reasonable investor" are the touchstones in defining materiality, and hence the duty to disclose, the Third Circuit concerned itself exclusively with the company's perspective, and never mentioned, let alone considered, the investor/shareholder:

> [U]nder the facts of this case, the breakdown of the Heublein-General Cinema talks on July 23 did not materially change the relative positions of either corporation and, as a matter of law, was not a material corporate development giving rise to a duty to disclose. A 15.

While the events of July 23 may not have made a material difference in either company's position, their actual impact on the investing public was tremendous. Heublein and General Cinema had been at odds for at least six months prior to July 23. Initially, General Cinema was buying Heublein stock and driving up the

price of Heublein's shares. Later, the companies declared a truce to try to resolve their differences, and the price stabilized.

The truce ended on July 23. Based on past history, this development was clearly material to the public and to shareholders in trying to determine the future value of Heublein stock. Armed with the information the majority has held was "immaterial" as a matter of law, a reasonable shareholder would have concluded that the bidding war was going to resume and that the price of Heublein stock would again increase. It seems impossible to conclude, as the Third Circuit did, that the investment decisions made by reasonable investors would not be materially influenced by information indicating renewed buying that would increase the price of their shares. See, Brascan Ltd. v. Edper Equities Ltd, 477 F. Supp. 773 (S.D.N.Y. 1979).

This Court should grant the Writ and reaffirm that materiality, and thus the duty to disclose, must be determined from the perspective of the investor, not the company.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for A Writ Of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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No.

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM, 1983

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.,

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

CERTIFICATE OF SERVICE

It is certified that, pursuant to Rules 19 and 28 of this Court, on December 27, 1984, ALEXANDER D. BONO, ESQUIRE, a member of the bar of this Court, caused three copies of the Petition for Writ of Certiorari in the above case, together with three copies of the Appendix

to the Petition, to be served on counsel for the respondents as follows:

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84-1025

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FILED
DEC 27 1984
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE
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OCTOBER TERM, 1983

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

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v.

HEUBLEIN, INC.

and

R. J. REYNOLDS INDUSTRIES, INC.

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1846

GREENFIELD, BRUCE H., individually and as a representative of a class of persons similarly situated

vs.

HEUBLEIN, INC.,
R. J. REYNOLDS INDUSTRIES, INC., and
R. J. REYNOLDS TOBACCO COMPANY

Bruce H. Greenfield, et al., *Appellants*

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 82-3463)

Argued
June 18, 1984
Before: ALDISERT, *Chief Judge*,
HIGGINBOTHAM and ROSENN, *Circuit Judges*.
(Filed August 29, 1984)

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OPINION OF THE COURT

ALDISERT, *Chief Judge.*

This appeal presents two principal questions for our consideration: (1) when does a corporation, the target of both friendly and hostile takeover activity, have a duty to disclose publicly the substance of its discussions with the suitor corporations; and (2) if the target makes a public statement, when is that statement materially misleading and under what circumstances must such a statement, if correct when issued, be updated? Here, Bruce H. Greenfield, both individually and as representative of a class of similarly situated investors, sued Heublein, Inc. (hereinafter referred to as "Heublein"), R. J. Reynolds Industries, Inc., and R. J. Reynolds Tobacco Company (hereinafter referred to jointly as "Reynolds") claiming that they violated the federal securities laws by failing to disclose properly information related to certain merger and anti-takeover negotiations. The district court granted defendants' motion for summary judgment, and we affirm.

I.

Beginning in the mid-1981, Heublein, Inc. came to be regarded as an attractive target for a corporate takeover. One suitor, the General Cinema Corporation, pursued an aggressive approach to acquisition. It began making large, open market purchases of Heublein stock and by February 1982 owned 2.1 million shares, or about 10% of the then outstanding shares. By the end of May 1982, General Cinema's stake in Heublein had increased to 18.9%. At this point, General Cinema suspended open market

purchases of Heublein stock. Although General Cinema, in its Schedule 13D filing with the Securities and Exchange Commission, described these purchases as "for investment only," Heublein regarded this activity as part of a hostile takeover attempt and responded accordingly. Early in 1982, Heublein established a high level executive strategy group to look into ways of defusing the General Cinema moves. The members of the group included Heublein President and Chief Executive Officer, Hicks Waldron, Chairman, Stuart Watson, and General Counsel, George Caspar.

By early 1982, Reynolds also became interested in acquiring Heublein. After observing the increased open market purchases by General Cinema, Reynolds began to investigate Heublein's corporate position more seriously and decided that, while Heublein was an attractive target, Reynolds could not afford to get into a bidding war and did not want to take any action that Heublein might consider hostile. Reynolds, thus, assumed the position of the white knight, waiting in the wings, ready to rescue fair Heublein from the clutches of General Cinema.

July 1982 became the decisive month. For several months Heublein had been trying to reach an agreement with General Cinema to avert an open market buy-out. Although some progress had been made, on July 8 General Cinema altered its bargaining position and issued Heublein a series of "non-negotiable" demands. Waldron and Watson of Heublein considered the demands unacceptable and responded by setting up a confidential meeting with J. Paul Sticht, Chairman of Reynolds, for July 9. At this meeting, Waldron and Watson described their problems with General Cinema, stated their desire to have Heublein remain an independent company, and inquired whether they might expect any hostile action by Reynolds. Sticht confirmed that Reynolds would

make no adverse moves against Heublein and went on to describe in some detail both Reynolds' management philosophy and corporate structure. The parties also discussed how the two companies could be combined and how Heublein's upper management personnel could be integrated into Reynolds' organization. This meeting can be fairly described as a preliminary merger discussion and no formal understanding or agreement was reached.

On July 14 General Cinema told Heublein that it was considering selling one of its assets, a Florida television station, valued at approximately $150,000,000. Heublein, recognizing that a large influx of capital would give General Cinema the opportunity to resume large scale open market purchases of its stock, did not view this as good news. Also on July 14, there was a dramatic increase in trading activity in Heublein's stock on the New York Stock Exchange (NYSE) as well as a moderate rise in price.[1] Because of the volume/price increase, Patrick Conneally of the NYSE contacted Caspar at Heublein and asked for a "no corporate development" statement. It is standard procedure for the NYSE to request such statements when the activity of a listed stock changes significantly indicating that some investors may be buying or selling large numbers of shares based on information not generally known to the public at large. After consulting with several other Heublein executives, Caspar issued the following statement, which was reported by Dow Jones after the close of trading on July 14th:

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1. On July 13, 1982, in typical trading, approximately 32,500 shares of Heublein stock were traded, and the closing price was $40.25 per share. On July 14, approximately 242,500 shares were traded and the price rose to $43.00 at closing.

> A spokesman for Heublein, Inc. said the Company was aware of no reason that would explain the activity in its stock in trading on the NYSE today.

Because of their increased concern over the actions of General Cinema, Waldron and Watson quickly organized another meeting with Sticht for the evening of July 15. Although this meeting covered much of the same territory as the July 9 meeting, the parties also discussed the July 14 public statement and the recent developments in the General Cinema situation.

Heublein still believed that it could still negotiate an amicable agreement with General Cinema. On July 23, however, General Cinema, impatient with the progress of the Heublein talks, reiterated its "non-negotiable" demands for what would constitute an acceptable agreement and openly threatened to resume its open market purchases. Heublein considered this turn of events fatal to the discussions and, sensing the seriousness of the threat, called upon its white knight for rescue. While many merger details had been discussed with Reynolds, price had never been mentioned. Therefore, at the direction of the respective corporate executives, the investment bankers for Reynolds and Heublein met on July 26 to discuss the per share purchase price. No agreement was reached. On the 27th, disappointed at the failure of the previous day's bankers meeting, Waldron and Watson met directly with Sticht and Joseph Albey, Reynolds' Vice Chairman. Late in the afternoon they agreed on a sale price of $60.00 per share.

On July 28 the NYSE again called Caspar to request that Heublein issue a "no corporate development" statement. Caspar responded that Heublein could not issue the statement, explained

why, and requested that trading on Heublein stock be suspended. With the issuance of a public statement by Heublein at 1:24 p.m., trading on its stock was halted.[2] On July 29 the merger was approved by the boards of both Heublein and Reynolds and was publicly announced.

Bruce Greenfield owned some 400 shares of Heublein stock since 1977. He was generally aware of the hostile takeover action by General Cinema and watched closely the increased activity, and rises in price, of Heublein stock during July 1982. He was aware of the "no corporate development" statement issued on July 14 and, on the basis of this information and his own knowledge, believed that Heublein's stock would be fully priced at $45.25. On July 26 he placed a "good till cancelled" order to sell his Heublein stock should it reach this price. On July 27 it reached $45.25 and Greenfield's stock was sold. On the next day, trading was suspended and on the 29th the merger was approved and announced.

Greenfield filed suit claiming that in issuing and in failing to update the July 14 statement Heublein had illegally withheld material information concerning its takeover discussions with both General Cinema and Reynolds.[3] The complaint alleged violations of §§ 10(b) and 14(e) of the Securities Exchange Act of 1934, 15

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2. The statement read:

> At Heublein's request, the New York Stock Exchange has suspended trading in the company's stock. There is a matter in the mid-stream of development and the company expects to have a statement tomorrow.

3. Specifically, the complaint alleged that Heublein violated the securities laws and that Reynolds aided and abetted in those violations.

U.S.C. §§ 78j(b) and 78n(e), Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983),[4] as well as several provisions of state law. Following discovery, the district court denied plaintiff's motion to amend his complaint, and, taking into account all of the arguments raised therein,

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4. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Section 14(e) of the Act, 15 U.S.C. § 78n(e) provides that:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

granted defendants summary judgment on all federal counts and dismissed the pendent state law claims.[5] Greenfield appealed.

II.

We will affirm the grant of summary judgment if there are no disputed issues of material fact and if the movant is entitled to judgment as a matter of law. *Coastal States Gas Corp. v. Department of Energy*, 644 F.2d 969, 978-79 (3d Cir. 1981). Greenfield argues that summary judgment was error here because the district court used the wrong legal standard to determine whether an agreement in principle to merge had been reached and, if the correct principle were

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Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

5. The district court did not certify a class. By agreement of the parties this issue was reserved until after the resolution of the summary judgment motion. *See* Memorandum opinion at 4 n.5, *reprinted in* app. at 1468a n.5.

applied, a factual dispute as to the intent of the parties would be present. Greenfield also argues that, as a matter of law, the July 14 statement was either materially misleading when issued or became so thereafter and Heublein failed to correct it. Therefore, the resolution of this appeal turns on the scope and character of a corporation's duty to disclose information to the investing public. Our analysis will follow two steps: (1) when does a duty to disclose arise in the context of merger/anti-takeover discussions, *see Staffin v. Greenberg*, 672 F.2d 1196 (3d Cir. 1982); and (2) when a voluntary public statement is made, under what circumstances will it be materially misleading when issued or become so on the basis of subsequent events, *see Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

III.

Rule 10b-5 and § 10(b) of the Act make it unlawful to fail to disclose material information in connection with the purchase or sale of securities. *Chiarella v. United States*, 445 U.S. 222 (1980); *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Similarly, § 14(e) of the Act requires that statements made in connection with proxy solicitations and tender offers set forth all material facts. *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). Such disclosures are required to insure that all investors have similar relevant information upon which to base investment decisions and to protect the basic integrity and fairness of the exchange markets. *Rochelle v. Marine Midland Grace Trust Co.*, 535 F.2d 523 (9th Cir. 1976). If a corporation is not trading in its securities and is not otherwise under a duty to disclose material corporate information, but it

voluntarily chooses to make a public statement, if that statement is "reasonably calculated to influence the investing public . . ." the corporation has a duty to disclose sufficient information so that the statement made is not "false or misleading or . . . so incomplete as to mislead . . . ." *Texas Gulf Sulphur Co.*, 401 F.2d at 862.

With specific reference to merger discussions, we have held that, so long as they are preliminary, no duty to disclose arises. *Staffin*, 672 F.2d at 1205-07. We reasoned that because disclosure of such tentative discussions may itself be misleading to shareholders, preliminary merger discussions are immaterial as a matter of law. *Id.* at 1206; *see also Susquehanna Corp. v. Pan American Sulphur Corp.*, 423 F.2d 1075, 1084-85 (5th Cir. 1970). We recognized, however, that as merger discussions progress, the need to protect shareholders from the potentially misleading disclosure gives way to the right of the shareholders to have notice of corporate developments important to their investment decisions. Thus, we further held that "[w]here an agreement in principle [to merge] has been reached a duty to disclose *does* exist." *Staffin*, 672 F.2d at 1207.

A.

With respect to the Reynolds negotiations, the court below held, as a matter of law, that no agreement in principle to merge was reached, and thus no duty to disclose arose, until sometime after Greenfield sold his stock on July 27. The court stated that:

> While an "agreement in principle" may exist before all of the details of a merger have been negotiated . . . it is clear that agreement on the fundamental terms of the merger must be reached before the merger negotiations become a material corporate development that must be

> disclosed to the investing public. Without fundamental agreement on the *price and structure* of a merger, the merger is simply too tentative to give rise to a duty of disclosure.

Memorandum opinion at 25, *reprinted in* app. at 1489a (emphasis added). As we read the district court's opinion, it stated that an agreement in principle requires agreement on the fundamental terms of the merger. The court then applied this formulation and determined that, in the case before it, an agreement in principle had not been reached until July 27 because the parties had not yet agreed on the price and structure, terms fundamental to this proposed merger. We find no error under the circumstances of this case.

Merger discussions arise in a wide variety of circumstances and the standard used to determine when disclosure of these is required must be both flexible and specific. Here the appellant takes issue with the district court's reliance on the price and structure factors and urges that we adopt a less rigid "intent of the parties to merge" standard. We find an intent standard inappropriate. Such a standard would leave both courts and corporations with insufficient guidance to determine when disclosure of merger negotiations should be made. This uncertainty, coupled with the possibility of substantial liability for tardy disclosure, would likely result in corporations issuing early public statements announcing the details of all merger talks. Not only would this have a disruptive effect on the stock markets, but, considering the delicate nature of most merger discussions, might seriously inhibit such acquisitive ventures.

Under the facts of the present case, it was more appropriate for the court below to determine that an agreement in principle to merge had been reached

when the parties reached agreement on "price and structure." Although it is difficult to draw a bright line definition that will apply to all cases, these two factors are typically critical aspects of any merger. Agreement as to price and structure provides concrete evidence of a mature understanding between the negotiating corporations. They constitute a useable and definite measure for determining when disclosures need be made. Finally, with both price and structure agreed to, there is only a minimal chance that a public announcement would quash the deal or that the investing public would be misled as to likely corporate activity.

Here, most of the structural details for integrating both the Heublein product line and management team into the Reynolds corporate body had been worked out by the middle of July. But price was not discussed in detail, nor agreed to, until later. Therefore, we conclude that, because Reynolds and Heublein did not agree on a merger price until the evening of July 27, it was not error for the district court to hold that, as a matter of law, no duty to disclose the substance of those negotiations arose prior to that time.

B.

The discussions between Heublein and General Cinema cast a slightly different shadow. The goal of those discussions was not to arrive at an agreement to merge but rather to halt a hostile, open market takeover. Further, the result of the talks was not an agreement but, at best, a stalemate. In terms of the duty to disclose, however, the differences between Heublein's discussions with General Cinema and those with Reynolds are more of form than legal substance.

As with the Heublein-Reynolds preliminary merger negotiations, the Heublein-General Cinema discussions were still being seriously pursued through

most of July, at least by Heublein. As its talks with Reynolds made clear, Heublein still thought that it could deflate General Cinema's hostile takeover actions and come to some agreement that would assure the continued independence of Heublein. This was true despite the fact that General Cinema had, on July 8, issued "non-negotiable" demands and, on July 14, expressed its intent to sell the Florida television station. While these elements troubled Heublein and caused it to accelerate its parallel negotiations with Reynolds, it was not until July 23, when General Cinema reiterated its prior statements and threatened to resume open market purchases of Heublein stock, that Heublein realized that further talks would be futile.

Therefore, until July 23, the Heublein-General Cinema "anti-takeover" discussions were alive, if falteringly so. They were, however, clearly "preliminary" as no consensus "on the fundamental terms" of any agreement between the parties had been reached. Any disclosure up to this point would have been based on facts that were subject to change at any time. As the situation evolved, successive, possibly cancelling, announcements might have been required. This would have tended to confuse and mislead, rather than enlighten, the investing public. *See Staffin*, 672 F.2d at 1206-07 (citing to the American Stock Exchange Manual at 104). Therefore, by analogy to the preliminary merger situation, we hold that Heublein was under no duty to disclose the substance of its General Cinema talks prior to July 23.

On July 23, with General Cinema taking an increasingly hostile stand, Heublein abandoned all hope of reaching an agreement. Appellant urges that we characterize this abandonment as the negative equivalent of an agreement in principle to merge and, thereby, hold that, as of July 23, Heublein was under a

duty to disclose the status of its talks with General Cinema. Appellant does not cite, nor does our research disclose, any case in support of this novel theory. On the facts of this case, there are several reasons why we choose not to be the first court to create such a duty. Failure to agree is not the negative equivalent of an agreement in principle. If parties reach an agreement in principle, they formally change their relative positions; if they fail to reach such an agreement, they are simply left in the same positions they would have been had no negotiations taken place. Thus, while an agreement in principle to merge, as a matter of law, constitutes a material corporate development requiring public disclosure, the failure to agree may well constitute no development at all, only, at best, a foregone opportunity. Such was the case here. Both before the negotiations began and after they were abandoned, General Cinema owned a substantial amount (nearly 20% by June 1982) of Heublein's outstanding stock and was, at least implicitly, in a position to increase that stake through continued open market purchases. Both before and after, Heublein considered these purchases to represent hostile action and was pursuing strategies designed to block General Cinema's takeover activity. Therefore, under the facts of this case, the breakdown of the Heublein-General Cinema talks on July 23 did not materially change the relative positions of either corporation and, as a matter of law, was not a material corporate development giving rise to a duty to disclose.

IV.

Although a corporation may be under no duty to disclose certain inside information, if it voluntarily chooses to make a public statement that is reasonably calculated to influence the investing public, such a statement may not be "false or misleading or . . . so

incomplete as to mislead . . . ." *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). Further, if a corporation voluntarily makes a public statement that is correct when issued, it has a duty to update that statement if it becomes materially misleading in light of subsequent events. *Sharp v. Coopers & Lybrand*, 83 F.R.D. 343, 346-47 (E.D.Pa. 1979). Appellant argues: (1) that Heublein's July 14 statement, issued to the NYSE, was materially misleading when issued; and (2) that even presuming it was not materially misleading when issued, it became so in light of subsequent events and was never corrected.

A.

As noted earlier, based on unusually high trading activity in Heublein's stock on July 14, the NYSE requested, and Heublein's General Counsel, after checking with several other executives, issued, the following "no corporate development" statement:

> A spokesman for Heublein, Inc. said the Company was aware of no reason that would explain the activity in its stock in trading on the NYSE today.

The court below concluded that this statement was not materially misleading. Appellant urges us to reverse this determination. Whether a statement is materially misleading is a mixed question of law and fact to which we would normally apply a mixed standard of review. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102 (3d Cir. 1981). But here, because appellant argues that the district court erred in its application of legal precepts in determining that the subject statement was not misleading, our review is plenary.

The request for a "no corporate development" statement was an inquiry to try to explain the upsurge in public activity in Heublein's stock. As we have previously established, on July 14, Heublein was under no duty to disclose, and had not disclosed, the substantive elements of its discussions with either Reynolds or General Cinema. Each discussion was in a preliminary stage and no "agreement in principle," or any functional equivalent thereof, had been reached. Further, because of the confidential nature of these discussions, there was no basis for Caspar to believe, and appellant alerted the district court to no evidence which might tend to prove, that any of the details of these discussions, not previously known to the public, had been recently leaked.[6] Also, although Heublein had recently been the subject of public speculation regarding possible mergers and takeovers, *see* Wall St. J., Jan. 28, 1982, at 12, *reprinted in* app. at 83a, there is nothing to suggest that it started or encouraged any such rumors. Finally, with respect to General Cinema, its open market purchases were a matter of public record, *see id.*, May 27, 1982, at 2, *reprinted in* app. at 82a, as was Heublein's resistance thereto, *see* Heublein Press Release of Feb. 22, 1982, *reprinted in* app. at 85a; Wall St. J., June 1, 1982 at 10, *reprinted in* app. at 199a. Therefore, when the NYSE called Caspar on July 14, he was understandably unable to explain what had caused the dramatic increase in activity in Heublein's stock that day. While he, and

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6. The dissent suggests that even privileged information must be disclosed because of the probability that information "could have been leaked to the investing public or ascertained by the investing public," typescript dissent at 13, that the two companies were exploring a merger. Imposing such a duty prior to July 28 runs counter to the precept that there is no duty to disclose negotiations until an agreement in principle has been reached. We know of no duty to disclose ongoing negotiations because of the possibility of a leak.

other Heublein executives, clearly knew of information that might have accounted for the increase in trading, there was no indication that any of this privileged information had been leaked or that they knew of, or had, information that insiders were engaged in trading. Accordingly, there is no support to the keystone of the dissent's hypothesis of "the high probability that this information could have been leaked," dissent typescript at 13. Under these circumstances, we conclude that, as a matter of law, Caspar's statement that Heublein "was aware of no reason that would explain the activity in its stock . . ." was not false, inaccurate, or misleading.[7]

B.

Appellant next asserts that, even presuming the July 14 statement was correct when given, subsequent events made it materially inaccurate and Heublein breached its duty to correct it. Heublein responds that, by its own terms, the statement spoke only about the activity in its stock on July 14. The statement expired the next day and, therefore, was inapplicable to subsequent trading activity. Thus, Heublein asserts that the company was under no duty to correct the contents of the statement even if it were to become materially misleading on the basis of future events.

Although a close reading of the statement lends some support to Heublein's view, we need not concern ourselves with it further because, even presuming that

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7. Although Caspar could have made any number of other statements saying substantively the same thing, this is of no consequence to our decision today. We must judge the statement made. Although Caspar might properly have responded "no comment" to the NYSE inquiry, this likewise is of no import. He did not so respond and for us to now hold that he should have would inexorably imply that the statement he actually made was legally infirm. This, as we have demonstrated, is not the case.

the July 14 statement survived the date of issuance, as a matter of law, it never became materially misleading on the basis of subsequent events and, therefore, no duty to correct ever arose. This conclusion inescapably follows because, as previously shown, Heublein was never under a duty to disclose any of the substantive details of its discussions with either Reynolds or General Cinema prior to July 28.

V.

Appellant raises several final contentions, none of which need detain us long. First, because we conclude that the grant of summary judgment against appellant on his federal securities claims was proper, the district court did not err in dismissing the aiding and abetting claims against Reynolds. Second, because the district court, in ruling on defendant's summary judgment motion, expressly considered the new claims contained in appellant's motion to amend his complaint, the court's refusal to grant the amendment motion was not error in light of its disposition of the case. Last, appellant asserts that, if all else done below was proper, then, as to its state law claims, the district court should have transferred them to the appropriate state court as provided in 42 Pa. Cons. Stat. Ann. § 5103 (Purdon 1983), rather than simply dismissing them. *See Weaver v. Marine Bank*, 683 F.2d 744 (3d Cir. 1982). Because appellant, both at trial and on appeal, failed to present any equitable considerations that would indicate why the state claims should be transferred, we hold that it was not error for the district court to have dismissed them. Moreover, Pennsylvania has now amended its transfer statute to permit the preservation of claims filed in federal court without the necessity of any transfer order. 42 Pa. Cons. Stat. Ann. § 5103(b) (Purdon Supp. 1983). *See McLaughlin v. Arco Polymers, Inc.*, 721 F.2d 426 (3d Cir. 1983).

VI.

Accordingly, the judgment of the district court will be affirmed.

HIGGINBOTHAM, A. LEON JR., *Circuit Judge*, dissenting.

I dissent from the majority opinion because I believe that Heublein's July 14 statement was false or misleading. In my view, it is false or misleading for a corporation to *voluntarily* issue a statement that it is aware of no reason to explain increased trading in its stock when the corporation "clearly knew of information that might have accounted for the increase in trading." (Majority Opinion at 20).

I agree with the majority that a corporation is under no legal obligation to make disclosures concerning its merger activities until an agreement in principle is reached. I also agree that on July 14, when the NYSE sought a no corporate development statement from Heublein, no agreement in principle had yet been reached between Heublein and Reynolds. Moreover, I do not believe that a NYSE inquiry concerning corporate activity creates a duty to disclose. Thus, on July 14, Heublein was under no legal obligation to issue *any* statement in response to the NYSE inquiry concerning the unusually high trading activity in Heublein's stock on that day. Even though, as the majority concedes, Heublein clearly knew of information that could have accounted for the increased trading of its stock, Heublein could have remained silent in the face of the NYSE inquiry or answered "no comment."[1]

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1. An agreement in principle had not been reached as of July 14; thus, on the that date, Heublein was under no legal obligation to disclose its preliminary merger discussions.

My disagreement with the majority opinion involves Heublein's breach of its duty not to mislead. This duty applies to any corporate statement reasonably calculated to influence the investing public *whether or not* a duty to disclose exists.[2] Once Heublein opted, however, to issue a statement that was reasonably calculated to influence the public, the July 14 statement, Heublein was obligated to ensure that its statement was not "false or misleading or . . . so incomplete as to mislead." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968), *cert. denied*, 349 U.S. 976 (1969). In addition, Heublein had a duty to update the July 14 statement if it became materially misleading in light of subsequent events. *See Sharp v. Coopers & Lybrand*, 83 F.R.D. 343, 346-47 (E.D. Pa. 1979).

In this case the majority and dissent agree that at the time Heublein issued its July 14 statement, it "clearly knew of information that might have accounted for the increase in trading" (Majority Opinion at 21) of its stock. Having established this clear knowledge on the part of Heublein, the question becomes whether Heublein misled the investing public by issuing the following *voluntary* response to an NYSE inquiry concerning the increased trading in Heublein's stock on July 14.

Where one is not under a legal obligation to disclose, I do not consider a response of "no comment" to be a statement carrying any legal significance. In my view it is the legal equivalent to not making a statement at all.

2. This case concerns both the duty to disclose where an agreement in principle has been reached and the duty not to issue corporate statements which are false or misleading. I have absolutely no dispute with the majority's conclusion that Heublein was under no duty to disclose at the time it issued its July 14 statement. Thus, this dissent concerns only the duty relating to a voluntary corporate statement "reasonably calculated to influence the investing public."

A spokesman for Heublein, Inc. said that the Company "was aware of no reason that would explain the activity in its stock" in trading on the NYSE that day. Majority Opinion at 21. I believe that Heublein's July 14 statement was false or misleading when issued and remained so throughout the merger discussions involving Heublein, Reynolds and General Cinema. In my view, the July 14 statement must be considered false or misleading because, as the majority concedes, at the time the statement was made Heublein clearly knew of information that could have accounted for the increased trading of its stock on that day.

It is not clear why the majority refuses to consider Heublein's July 14 statement misleading. Perhaps the majority wishes to prevent the NYSE from dictating by its inquiries when corporate disclosures are made.[3] If, however, the majority's concern is to protect the corporation from being forced to make premature disclosures and thereby to protect a corporation from possibly having to upset sensitive negotiations, this concern, while legitimate, appears misguided. There is nothing in the record of this case to suggest that a corporation, when faced with a "no corporate development" inquiry from the NYSE is faced with the all or nothing proposition of either completely spilling the beans or claiming (even at the expense of total forthrightness) that it has no knowledge whatsoever of any information that might explain the stock activity of concern to the NYSE.

The majority states in footnote 6 of its opinion that my dissent imposes a duty to disclose privileged information before an agreement in principle has been reached. Presumably, the majority reads my dissent as

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3. As noted earlier, however, a NYSE request for a no corporate development statement does not oblige the corporation to disclose anything.

allowing an NYSE inquiry, or even the mere knowledge of privileged information possibly relevant to market activity if leaked, to trigger the duty to disclose. However, footnote 6 of the Majority Opinion clearly demonstrates how the majority fails to distinguish between the duty to disclose and the duty not to mislead. The majority does not appreciate that this dissent stands for the simple proposition that in the face of a NYSE inquiry, Heublein could have remained silent or answered "no comment," *but*, by virtue of voluntarily issuing its July 14 statement, Heublein assumed responsibility for honoring another duty -- the duty not to mislead. Thus, if the majority's concern is preventing the NYSE from dictating when corporate disclosures must be made, that concern is not implicated in this case.

If the majority is truly concerned about protecting the public from misleading corporate information, it is difficult to understand how the majority could condone Heublein's July 14 statement. In that statement Heublein said: "the Company was aware of no reason that would explain the activity in its stock in trading on the NYSE today." Majority Opinion at 6. In effect, Heublein stated that it had *no* knowledge of *any* corporate activity that would affect trading in its stock. How can the majority consider Heublein's July 14 statement not to be false or misleading or so incomplete as to mislead when the majority recognizes that Heublein "clearly knew of information that might have accounted for the increase in trading [in Heublein's stock]" on July 14? Majority Opinion at 21.

The majority itself recognizes that a statement issued prior to July 27, the day the agreement in principle was reached, could mislead the investing public. The majority stated,

> [a]ny disclosure up to this point would have been based on facts that were subject to change at any

> time. As the situation evolved, successive, possibly cancelling, announcements might have been required. This would have tended to confuse and mislead, rather than enlighten, the investing public.

Majority Opinion at 16. Notwithstanding its recognition that a statement issued before July 27 would have tended to mislead, the majority holds the July 14 statement to be not misleading.

Not only does the majority allow Heublein's July 14 statement to stand as not misleading on that date, the majority misinterprets the law in avoiding appellant's alternative contention that even assuming the July 14 statement was correcct when given, subsequent events made it materially inaccurate and Heublein breached its duty to correct it.

The majority states,

> even presuming that the July 14 statement survived the date of issuance, as a matter of law, it never became materially misleading on the basis of subsequent events and, therefore, no duty to correct ever arose. This conclusion inescapably follows because, as previously shown, *Heublein was never under a duty to disclose any of the substantive details of its discussions with either Reynolds or General Cinema prior to July 28.*

Majority Opinion at 22 (emphasis added).

The majority, in my view, cannot avoid this issue. As stated earlier, this case concerns two separate duties: (1) the duty to disclose an agreement in principle, and (2) the duty *not* to make a statement that is "false or misleading or . . . so incomplete as to mislead" the investing public, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). This second duty also

requires the updating of statements which become misleading because of subsequent events. *See* Majority Opinion at 18.

The first duty is engaged only when an agreement in principle has been reached. The second duty is engaged whenever a corporation issues a statement reasonably calculated to influence the investing public; thus, this duty can be engaged irrespective of whether an agreement in principle has been reached. The majority recognized this second duty when it said,

> if a corporation voluntarily makes a public statement that is correct when issued, it has a duty to update that statement if it becomes materially misleading in light of subsequent events. *Sharp v. Coopers & Lybrand*, 83 F.R.D. 343, 346-47 (E.D.Pa. 1979).

Majority Opinion at 18-19. Thus, the majority's conclusion that "no duty to correct ever arose . . . because . . . Heublein was never under a duty to disclose any of the substantive details of its discussions with either Reynolds or General Cinema prior to July 28" (Majority Opinion at 22) is erroneous. Heublein had a duty to update irrespective of whether it had a duty to disclose at the time of the NYSE inquiry. These are two separate duties. The majority is wrong to use the absence of a duty to disclose to avoid the presence of the duty to update where a statment already has been made.

I fear that today's decision will have serious repercussions for the investing public caught in the middle of battles for and against mergers, acquisitions and corporate control. The majority states,

> because of the confidential nature of [Heublein's discussions with Reynolds and General Cinema], there was no basis for Caspar to believe, and appellant alerted the district court to no evidence

> which might tend to prove that any of the details of these discussions, not previously known to the public, had been recently leaked. Majority Opinion at 20.

The majority suggests that Heublein's July 14 statement would be false or misleading only if Heublein knew that information *was leaked*. Majority Opinion at 20-21. I believe that Heublein's July 14 statement is misleading because Heublein knew of information that *if leaked* would have explained the increase in trading of Heublein's stock on that day. Statements such as Heublein's July 14 statement should be permitted only when Heublein itself knows of no information that could have accounted for the increase in trading of its stock. Because then and only then would the impression conveyed to the investing public that business is proceeding as usual be true.

Under the majority's approach Heublein could issue the July 14 statement, without updating it, so long as (1) an agreement in principle had not yet been reached and (2) the merger negotiations were confidential. In short, Heublein is free to assume that its confidences are maintained and accorded complete secrecy, even in the face of otherwise inexplicable investor activity. I find that assumption unwarranted.

Where there has been no agreement in principle reached by the parties, a corporation is under no obligation to disclose information that it desires to keep secret. This is true even in the face of a NYSE request for a no corporate development statement. Silence or a simple "no comment" is always an available option for a corporation. Such responses would not require any future updates. Updates are required only of corporate disclosures, and neither of these responses can be considered a disclosure. Moreover, these responses would certainly protect the corporation from disclosing sensitive developments

while simultaneously protecting the public from being falsely assured that all is proceeding at a routine, business-as-usual pace when that is not the case.

Although the majority's approach makes it easier to put together corporate deals and mergers, I do not believe that the holding of the majority protects sellers or purchasers of stock. If anything it subjects the investing public to future voluntary misrepresentations by corporations in the midst of allegedly confidential merger discussions. So long as they remain unaware of leaks, even though there is information to leak, they can falsely assure the public that all is proceeding at a business-as-usual pace. I find it difficult to assume that a corporation's confidences are accorded more secrecy than the contents of high level discussions held in the oval office which are all too frequently leaked to the press.

Similarly, in the "Pentagon Papers" cases[4] the New York Times and the Washington Post obtained access to all or most of a 47-volume super secret Defense Department Study on the "History of United States Decision Making Process on Vietnam Policy." They also obtained the Defense Department's Weapons System Evaluation Group's classified document entitled "*The Command and Control Study of the Tonkin Gulf Incident.*" If the U. S. Defense establishment could not keep perfectly secret their volumes of classified documents which allegedly affected the "security of the United States," *id.* at 718, why should we believe that Heublein can maintain total confidentiality as to merger discussions among its diverse executives, staff, secretarial and clerical personnel; its outside

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4. New York Times v. United States, 328 F.Supp. 324 (S.D. N.Y.), rev'd. 444 F.2d 544 (2d Cir.); rev'd. 403 U.S. 714 (1971). *See also* United States v. Washington Post, 446 F.2d 1327 (D.C. Cir.) aff'd 403 U.S. 713 (1971).

investment banker's staff and its outside counsel's staff. The facts of life as we know them are that complete confidentiality has not always been possible at either the White House or the Defense establishment or in the non-clandestine corporate community.

The truth of the matter is that material nonpublic information is leaked to some "favorites" among the investing public and the success of many investors is not because they have the genius of an Einstein but solely because they have tidbits of information that the general public does not have. Insider trading is the most dramatic example of the use of material nonpublic information. Although this case does not involve insider trading, the problem of insider trading demonstrates that material nonpublic information is often leaked and used. For example in 1983, the S.E.C. brought 24 cases as compared to 20 commmenced during fiscal 1982 and the total number brought since 1949 (121 cases). 1983 S.E.C. Ann. Rep. 5. These figures for 1982 and 1983 represent 28% of the cases that the S.E.C. has brought in this area since 1949.

The problem of investors trading based on nonpublic information is not restrictd to contexts involving violations of law. In *Dirk v. SEC*, 103 S. Ct. 3255 (1983), the Supreme Court recognized that nonpublic information may even be dislosed by insiders in contexts not involving insider trading or violations of law. *Id.* at 3262-63. As the Supreme Court noted "only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information." *Id.* at 3262. "[This] exception is based upon Congress' recognition that [market professionals] contribute to a fair and orderly marketplace at the same time they exploit the informational advantage that comes from their possession of [nonpublic information]." *Id.* at 3262, quoting *United States v. Chiarella*, 445 U.S. 222, 233, n.16.

Thus, it is possible that the increase in trading of Heublein's stock occurred based on nonpublic information. In light of this, we believe that the majority is in error when it allows Heublein to assume that nonpublic information could not have been leaked knowingly or unknowingly by persons associated with Heublein, its lawyers, its investment bankers, Reynolds or the host of personnel affiliated with these groups.

Yet the majority bases its decision today on an assumption that Heublein and every individual or organization privy to Heublein's critical information had no leaks. I believe our concern should be whether *any* information existed *to be leaked.* The majority expressly conceded that such information exists when it states that Heublein "*clearly* knew of information that might have accounted for the increase in trading . . . ." Majority Opinion at 21 (emphasis added).

This information was of great significance. When Heublein issued its July 14 statement that the Company was aware of no reason that would explain the activity in Heublein's stock in NYSE trading, that day there were in fact significant reasons known to its top executives that could have explained the increased activity of its stock.

On July 9 -- five days before Heublein issued its statement -- the top executives from Reynolds (Sticht) and Heublein (Watson and Waldron) had met in the VIP room of the Hartford Airport to accommodate Sticht, who flew in from North Carolina on Reynolds' corporate jet for the meeting. These top executives discussed how the companies would function if merged and discussed the synergies in staff and productivity improvement that would result from the merger. This included Heublein's ability to improve its marketing program because of the resources available at Reynolds. Heublein would thus be able to do a "more aggressive job of building Kentucky Fried Chicken stores and

expanding [its] market presence in that business." (Appendix at 1116A-17A, 1120A-21A). They discussed Heublein's desire to maintain its "independence" and how the food aspect of Reynolds would be combined with Heublein's into one overall food operation of which Waldron would be the head. They decided that Waldron and Watson would become directors of Reynolds. (1115A-16A; 1124A-26A). The significance of the meeting was recognized. Sticht had asserted that Reynolds was prepared to go ahead (995A), and he considered this meeting a "fairly important turn of events."

The conference of the presidents of these two major institutions could be considered a corporate summit meeting. Indeed after this meeting Waldron called Heublein's investment banker -- Krimendahl of Goldman Sachs & Company. He advised Krimendahl that Waldron would become the head of the combined foods division once Heublein and Reynolds merged. Waldron asked Krimendahl to pass all of this information along to attorney McNally of White and Case. After July 8th, Waldron held separate meetings with Watson, Heublein's task force members and their outside advisors, Krimendahl of Goldman Sachs & Company and McNally of White and Case, during which the idea of Reynolds acting as Heublein's "white knight" was discussed. (Appendix at 1071A-72A; 1074A-75A; 1078A-79A; 1080A; 1083A; 1085A; 1089A; 1095A; 1099A-1102A; 1135A; 1137A).

During this same period Reynolds had a task force that evaluated Heublein with a view toward acquisition of it within a specific price range. (1053A-54A; 1162A-63A). With several separate groups, executives, investment banking staff, legal staff and probably many other persons working on the details of a possible Heublein merger, it is not surprising that these frantic and secretive activities might be leaked,

be ascertained, or be unintentionally brought to the attention of persons buying or selling Heublein stock. Certainly any information that suggests these corporate giants were exploring a possible merger could explain the activity on the stock market.

The majority seems determined to rest its entire case on the belief that corporate executives should be able to suggest that all is proceeding at a routine, business-as-usual pace when that is not the truth so long as an agreement in principle has not been reached at the time the statement is issued. Given the majority's concession that in this case Heublein knew of information that might have accounted for the increase in the trading of Heublein's stock and given the possibility that information could have been leaked to or ascertained by some investors, a statement by Heublein that it was aware of no reason to explain the increase in the trading of its stock was false or misleading or so incomplete as to mislead.

I dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1846

GREENFIELD, BRUCE H., individually and as a representative of a class of persons similarly situated

vs.

HEUBLEIN, INC.,
R. J. REYNOLDS INDUSTRIES, INC., and
R. J. REYNOLDS TOBACCO COMPANY

Bruce H. Greenfield, et al., *Appellants*

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 82-3463)

Argued June 18, 1984
Before: ALDISERT, *Chief Judge*,
HIGGINBOTHAM and ROSENN, *Circuit Judges*.
(filed August 29, 1984)

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above-captioned case be corrected as follows:

The word "correcct" shall be changed to "correct" on page 24, fifth line of the first full paragraph.

The word "commenced" shall be changed to "commence" on page 28, twelfth line of the first full paragraph.

The word "restrictd" shall be changed to "restricted" on page 28, second line of the second paragraph.

The word "dislosed" shall be changed to "disclosed" on page 28, fifth line of the second paragraph.

BY THE COURT,

A. Leon Higginbotham, Jr.

Circuit Judge

DATED: October 10, 1984

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE H. GREENFIELD, et al.	:	CIVIL ACTION
v.	:	
HEUBLEIN, INC., R.J. REYNOLDSINDUSTRIES, INC., and R.J. REYNOLDS TOBACCO COMPANY	:	NO. 82-3463

MEMORANDUM

Newcomer, Jr. October 19, 1983.

Before the Court is the defendants' motion for summary judgment as to Counts I and II of the Complaint and for dismissal of Counts III and IV of the complaint.

This action has its roots in the attempted takeover of the defendant, Heublein, Inc., by the General Cinema Corporation; a takeover that eventually let to the acquisition of Heublein by a "white

knight," the defendant Reynolds Industries, Inc. ("Reynolds").[1]

The plaintiff is a Heublein shareholder who sold his shares shortly before the acquisition of Heublein was made public. He claims that a statement issued by Heublein several weeks before the announcement of the acquisition was materially misleading and thus violated Section 10b of the Securities Exchange Act of 1934 (the 1934 Act), 15 U.S.C. §78j(b), Rule 10b-5 projulgated thereunder, 17 C.F.R. §240.10b- and Section 14(e) of the 1934 Act, 15 U.S.C.§78n(e). Reynolds is charged with aiding and abetting Huebline's violations

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[1] The R. J. Reynolds Tobacco Co. is also a named defendant. All parties

[Footnote 1 continued on next page]

of these provisions. Rule 56 of the Federal Rules of Civil Procedure provides the standard that must be used in ruling on motions for summary judgment. That rule provides, in pertinent part, that:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party, of course, has the burden of establishing that it is entitled to summary judgment. Adickes v. S.H. Kress &

[Footnote [1] continued]

> have agreed, however, that this corporation was simply the vehicle for Reynolds Industries' acquisition of Heublein. Accordingly, I will

[Footnote [1] continued on next page]

Co., 398 U.S. 144 (1970). Thus, the following summary presents the facts in the light most favorable to the plaintiff:

The plaintiff purchased 400 shares of Heublein common stock in 1977 at a price of $26.625 per share. In early 1982, he learned that the General Cinema Corporation was commencing a hostile takeover of Heublein.

As a result of the General Cinema situation he kept close track of the trading in Heublein stock. On July 14, 1982, the price of Heublein common stock went up $2-3/4 per share in very heavy trading.[2] On the afternoon of July 14,

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[Footnote [1] continued]

dismiss all claims asserted against the R. J. Reynolds Tobacco Company.

[2] On July 13, 1982, 32,500 shares of Heublein were traded on the New York Stock Exchange, closing at $40-1/4. On July 14, 1982, 242,500 shares were traded. The closing price was $43.00

1982, Heublein, in response to a query by the New York Stock Exchange, issued a statement which was reported by Dow Jones as follows:

> A spokesman for Heublein, Inc. said the Company was aware of no reason that would explain the activity in its stock in trading on the NYSE today.

In the days that followed, Heubleing stock continued to be traded at a high volume and maintained its price.[3] Plaintiff decided

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[3]

Date	Volume	ClosingDate	HighSale	LowSale
July 13	32,500	40 1/4	40 5/8	40 1/4
July 14	242,500	43	44 1/2	40
July 15	249,100	45	45	42 3/4
July 16	173,100	45 1/8	45 3/8	42 1/2
July 19	123,000	43 3/4	44 1/2	43 1/2
July 20	141,400	44 3/4	45 3/4	44
July 21	207,700	43 3/4	45 1/8	43 1/2
July 22	97,200	44	44 5/8	43 5/8
July 23	31,400	43 5/8	44 1/4	43 1/2
July 26	47,800	44	44 3/8	43 1/4
July 27	171,300	45 1/8	45 3/8	44 1/4
July 28	325,200	47 3/4	48	45

to sell his stock because he believed that it was fully priced. This decision was made on the basis of the Heublein statement, a statement made by General Cinema in early June that it would not acquire additional stock, and the integrity of the market in Heublein stock. The plaintiff examined the available public information and could see no reason to hold on to his Heublein shares. On July 27, 1982, the plaintiff sold his Heublein stock for $45.25 per share.

On the following afternoon trading was suspended in Heublein stock. At 1:24 p.m. Heublein issued the following press release

> At Heublein's request, the New York Stock Exchange has suspended trading in the company's stock. There is a matter in the mid-stream of development and the company expects to have a statement tomorrow.

On July 29, Heublein and Reynolds announced that their Boards of Directors had agreed to a merger. Under the merger agreement, Reynolds would make a cash tender offer for 11,350,000 Heublein shares (about 52% of Heublein's then outstanding common stock) at a price of $63.00 per share.[4] The remaining 48% of the Heublein shares would be exchanged for a package of Reynold's common and preferred stock having a combined value of $56.83 per Heublein share. Plaintiff has brought this action on behalf of himself and other Heublein shareholders

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[4] If more than 52% of Heublein's stock was tendered, then the shares were to be accepted on a pro rata basis.

who sold their shares between July 15 and the suspension of trading on July 28.[5]

The plaintiff seeks to recover the difference between the value he received for his Heublein shares and the value he would have received pursuant to the merger agreement. He alleges that Heublein's statement of July 14th was materially misleading because it did not disclose developments relating to General Cinema and to Reynolds. He further alleges that Heublein had a duty to correct its July 14th statement well before the

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[5] I have not yet addressed the issue of class certification. Pursuant to an agreement of the parties this issue is not to be raised until after the resolution of the issues raised in the present motion for summary judgment.

announcement of July 28th. The defendants contend that there was nothing material to disclose prior to July 28, and that, therefore, they are entitled to summary judgment.

As previously stated the acquisition of Heublein by Reynolds was generated by General Cinema's hostile bid to gain control of Heublein. The facts relating to that bid may be summarized as follows:

Between November 1981, and February, 1982, General Cinema purchased 2.1 million shares of Heublein common stock, about 9.7% of the shares then outstanding. On February 3, 1982, General Cinema filed a Schedule 13D with the Securities Exchange Commission.[6] The Schedule claimed that

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[6] A Schedule 13D statement is a disclosure statement that must be filed with the S.E.C. by open-market purchasers of large numbers of shares of

[Footnote [6] continued on next page]

the stock had been purchased for "investment" only. It further stated that General Cinema would increase its level of ownership in Heublein to 15% and would file the notification required under federal antitrust laws to enable it to purchase up to 49.9% of Heublein's stock. Heublein responded by filing suit against General Cinema on Februar 19, 1982, alleging that General Cinema had violated the 1934 Act by filing a false and misleading Schedule 13D that concealed General Cinema's intention to seek control of Heublein and by making

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[Footnote 6 continued]

> stock in a single company. The statement is required by Section 13(d) of the Securities Exchange Act of 1934, Act of June 6, 1934. 48 Stat. 881, as amended, Pub.L. 90-439, 82 Stat. 454 (1968), 15 U.S.C. §78m(d), and S.E.C. Rule 13(d)(1), 17 C.F.R. §240.13d-1 (1982), promulgated thereunder.

an illegal tender offer. Heublein had also purchased by March, 1982, 3.5% of General Cinema's stock and had filed its own statement under the antitrust laws enabling it to purchase 49.9% of General Cinema's stock.

Heublein further responded to the threat from General Cinema by organizing an internal "task force" of executives to identify and evaluate the options available to Heublein in the vace of the threat from General Cinema. This group was composed of Hicks Waldron, President and Chief Executive Officer of Heublein, Stuart D. Watson, Heublein's Chairman, Gwain H. Gillespi Senior Vice President, Finance and Administration, George J. Caspa Vice-President, Secretary and General Counsel, Gene R. Ehnen, vice-President, Finance, Robert W. Pratt, Vice-President, Planning and

Research, Jack Chisholm, Director of Development, and William Henn, Director of Strategic Planning. The group was at times joined by its outside advisors, H. Frederick Krimendahl, II of the investment banking firm of Goldman, Sachs & Co., Arthur Fleischer, Jr. of the law firm of Fried, Frank, Harris, Shriver and Jacobson (counsel to Goldman Sachs) and John McNally of the law firm of White & Case (counsel to Heublein).

It was immediately recognized that one of the options open to Heublein was to sell the company to a friendly suitor, or "white knight," in order to avoid a hostile take-over by General Cinema. During March or April of 1982 a list of possible "white knights" was compiled by the group with the aid of Goldman Sachs. Reynolds was one of

a number of corporations identified as a possible merger partner.

The group also examined other possible responses to General Cinema. These included the possibility of negotiating an agreement with General Cinema aimed at either an "asset swap" or a "standstill," and the acquisition by Heublein of businesses that would serve to block General Cinema's takeover bid by creating antitrust or other problems for General Cinema. The testimony of the members of the Heublein task force clearly indicates that these options were far more palatable to Heublein's management than was the acquisition of Heublein by a "white knight." In fact, prior to July, Waldron and Watson did not permit the subject of a white knight to be discussed at strategy group meetings because they felt that such discussions

would distract Heublein's managment from ongoing business concerns.

During the spring of 1982, General Cinema continued to purchase Heublein stock. By May of 1982 General Cinema held 18.9% of Heublein's outstanding shares. These purchases were widely covered by the press.

May of 1982 also brought certain developments at Reynolds concerning the General Cinema--Heublein situation. The increasing pressure placed on Heublein by General Cinema led Reynolds to conduct a detailed study of the possibility of acquiring Heublein. This study was known as "Project Flag," "Flag" being a code name for Heublein. Reynolds had for years bee interested in broadening its consumer products base. Heublein was one of the companies that Reynolds considered as a

good candidate for acquisition. Reynolds' interest in Heublein was reinforced by the fact that Reynolds' Chairman, J. Paul Sticht, had known Heublein's Chairman, Stuart Watson, for a number of years.

On May 7, 1982, the Project Flag group produced a report on Heublein. After General Cinema's announcement that it had acquired 18.9% of Heublein's stock, the Project Flag group prepared a more comprehensive report. This report included a description of Heublein, an assessment of how Heublein might fit into Reynolds, and a summary of the General Cinema--Heublein situation. The report was kept secret, and was only available to the members of Reynolds' Management Committee and the Project Flag Group. The report was prepared by the Project Flag group without the assistance of outside advisors. On the

basis of these reports, Reynolds' management concluded that Heublein was an attractive acquisition possibility, but that Reynolds should not become embroiled in a bidding contest to gain control of Heublein. Reynolds' Vice-Chairman, Joseph F. Abely, Jr., concluded in a memo to Sticht that Reynolds' best courst of action was to wait in the wings and see if Heublein eventually had to resort to a "white knight."

On May 7, 1982, Heublein's President Hicks Waldron, met with Richard B. Smith, General Cinema's Chairman and President. The purpose of the meeting was to discuss a possible "swap," specifically, an exchange of General Cinema's Heublein stock for a part of Heublein's Winde Division. This meeting did not in an agreement. Beginnin in late May, Heublein and General Cinema

entered into negotiations concerning the possibility of a standstill agreement, i.e., an agreement under which General cinema would stop buying Heublein shares and accept some restrictions on the use of the shares they already owned in exchange for representation on Heublein's board and other concessions. These negotiations, conducted both through investment bankers and directly, continued into early July. By July 7th Waldron felt that he and Smith were nearing an agreement. On July 8, however, Smith called Waldron and made significant changes in General Cinema's negotiating position. Smith made certain "non-negotiable" demands which he knew were unacceptable to Heublein. He also changed course by asserting that General Cinema was primarily interested in a "swap" for Heublein's Grocery Products Division,

rather than in reaching a "standstill" agreement. General Cinema's position was a sever blow to Waldron's hopes of negotiating a settlement of the General Cinema situation. These hopes were further shake when Waldron learned that General Cinema was going to sell a television station it owned in Miami. Waldron feared that General Cinema would be ablt to use the proceeds of this sale to finance the acquisition of even more Heublein stock on the open market. Negotiations continued, however. Waldron adn Edward Bates, a Heublein Director, met with Smith and Abra Collier, a General Cinema director, on July 21st, and Waldron telephoned Smith with a proposal on July 23rd. Smith adhered to his non-negotiable demands, however, and no agreement was ever reached.

During the period of negotiations be tween Waldron and Smith, there were

contacts between Heublein and Reynolds. On June 13th and 14th, Waldron and Sticht met at the Greenbriar Hotel in White Sulfur Springs, West Virginia. Both were there to attend an executive conference of the Grocery Manufacturers of America. At the meeting Sticht informed Waldron that while Reynolds would take no hostile actions against Heublein, Reynolds was interested in getting together with Heulbein. Sticht told Waldron that reynolds had completed a study of Heublein and that he was impressed by the results of that study. Waldron informed Sticht that Heublein was determined to remain independent, and that he believed that they would be able to do so. He added, however, that if this was not possible he would be in touch.

The next meeting between the top management of Heublein and Reynolds occurred on July 9th. This meeting was prompted by

the sudden deterioration of negotiations between Heublein and General Cinema, precipitated by the telephone call from Smith to Waldron on July 8.

The sudden change in General Cinema's negotiation posture alarmed Waldron. He suggested to Watson that they meet with Sticht because they should make some preparation for resorting to a "white knight," a move for which they were totally unprepared at that time. Waldron called Sticht and told him about General cinema's untimatums and suggested that they meet to discuss the possibility of a merger. Sticht agreed to meet with Watson and Waldron on the afternoon of July 9 at the Hartford airport.

On Friday afternoon, July 9th, Waldron called a meeting attended by the task force, Heublein's investment banker, and outside counsel. While the possibility of

Reynolds acting as a white knight was raised at the meeting, Waldron did not inform the group at large of the planned meeting with Sticht later that day. The group did discuss, however, other possible responses to the new developments in the General Cinema situation. These included the pursuit of a possible blocking acquisition by Heublein as well as the possibility of acceding to some of Smith's demands. At the end of the meeting, Waldron asked all members of the strategy group except Heublein's senior executives to leave the room so that there could be a private session with Heublein's outside advisors. At that session Krimendahl, Fleischer, and McNally were told that Waldron felt it was time to explore the "white knight" solution in case the General Cinema situation could not otherwise be resolved. Waldron explained that he and

Watson were meeting with Sticht that afternoon. He stated that the meeting was for the purpose of getting acquainted, and not for negotiations. Waldron explained that the meeting should not be discussed with anyone not present in the room, with the exception of George Caspar, Heublein's General Counsel.[7]

At the meeting, Waldron told Sticht that Heublein intended to remain independent if at all possible. He explained tha he had asked for the meeting in order to learn more about Reynolds, but not to negotiate a possible combination. The res of the meeting was generally taken up by Sticht's description of Reynolds and the

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[7] Caspar had left the room with the other members of the strategy group in order to avoid any embrassment.

possible synergies that would exist if Heublein and Reynolds were combined. Sticht also discussed Reynolds' management philosophy as well as the role that Waldron and other Heublein executives would play in the combined companies.[8]

At the end of the meeting Waldron and Watson reiterated their resolve to maintain Heublein's independence. They also expressed, however, the feeling that a merger with Reynolds "would be okay." Sticht told Watson and Waldron that Reynolds was prepared to go ahead with the merger, and that he hoped they would be in touch.

On July 14, Sticht reported the substance of the July 9th meeting to the

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[8] It was suggested that Waldron would be head of a joint Reynolds/Heublein food operation and that Watson and Waldron would become directors of Reynolds.

Reynolds Management Committee. It was agreed that Reynolds should continue to monitor trading in Heublein stock and be prepared to pursue Heublein should it appear that Heublein would not be able to maintain its independence. Waldron reported the substance of the meeting to Krimendahl and expressed his satisfaction with what he had heard from Sticht. Waldron asked Krimendahl to pass the information along to McNally at White & Case.

On July 14th, Waldron received a call from Smith confirming the rumor that General Cinema was going to sell its Miami televison station. While Smith told Waldron not to be upset by the news, Waldron was alarmed because the proceeds of the sale would enable General Cinema to resume their purchases of Heublein shares on the open market. Waldron felt that

Heubelin could not protect itself from such continued large block acquisitions.

At 3:55 in the afternoon on July 14th, George Caspar, Heubelin's General Counsel, received a call from the New York Stock Exchange. Caspar was informed that Heubelin's stock was up 3-7/8 to $44.00 on a trading volume of 235,200 shares, and that the stock had hit a high of $44-1/2 dollars that day.[9] Caspar was asked if Heublein was aware of anything that could have caused the increased activity in Heubelin stock. Caspar was aware that Salomon

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[9] See chart at footnote 3, supra.

The New York Stock Exchange computer is programmed to "flag" stocks with unusual price and volume changes so that the Exchanges staff can investigate the reasons for the activity. New York Stock Exchange Company Manual, Section A2, at A-18.

Brothers had made a 100,000 share institutional trade early in the day.[10] He also knew that only 153,800 shares had been traded by 2:00 P.M., without a significant price increase. The price had only climbed 2/8 by 3:00 o'clock, with the volume at 209,300 shares. By the time the New York Stock Exchange called Caspar, an additional 27,000 shares had been traded with a rise in price from 41-1/8 to 44. The stock closed at 43 on a volume of 242,500.

Caspar stated that he was not aware of anything that could account for the increased trading. He was asked to issue a press release stating that there were no "corporate developments." After consulting

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[10] Caspar's secretary kept an hour by hour report on trading activity in both Heublein and General Cinema stock.

with Gillespie and McNally,[11] Caspar issued the following statement on behalf of Heubelin:

> A spokesman for Heubelin, Inc. said the company was aware of no reason that would explain the activity in its stock in trading on the New York Stock Exchange today.

After Waldron's July 14th conversation with Smith, Waldron decided that it would be advisable to meet with Sticht again. Waldon called Sticht and set up a meeting for the evening of July 15th in Hartford. Sticht felt that Heubelin was desperate after hearing of General Cinema's sale of its Miami TV station, and agreed to fly to Hartford that very night to meet with Waldron and Watson. On the same date,

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[11] There is some dispute as to whether Caspar or Gillespie was aware of the July 9th meeting at the time the July 14th statement was issued.

Reynolds completed a merger game plan for "Project Flag." This plan was designed to enable Reynolds to proceed with a Heublein merger as smoothly and quickly as possible.

On the evening of July 15th, Sticht met with Watson and Waldron for about three hours at Watson's house in Hartford. Sticht attempted to convince Waldron and Watson that Heublein and Reynolds should "join forces." Much of the evening was spent discussing the accommodation of Heubelin's management team into Reynolds.[12] Also discussed were the General Cinema situation, the level of trading in Heubelin stock, and the

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[12] Sticht recalls discussing the press release, Waldron and Watson do not. In any event, none of the parties expressed the feeling that the release should be modified or updated as a result of their meeting.

July 14th press release. While Sticht expressed his desire to see a Reynolds/ Heublein merger, he also stated that Reynolds did not intend to get involved in a bidding war for Heubelin. Waldron reaffirmed Heublein's commitment to remain independent, but said that he thought it advisable to get to know Sticht and Reynolds better so that they could move quickly in the event General Cinema forced Hueblein to turn to a "white knight."

At the conclusion of the meeting, Sticht suggested that Reynolds and Heublein arrange to have their investment bankers meet. Sticht explained that Reynolds had decided to bring its investment banker, Dillon, Read & Co., into the picture. Waldron agreed to have Dillon Read meet with Goldman Sachs. On July 16th, Sticht told Abely to instruct Dillon Read to meet with Goldman Sachs. Abely did so, and also

had the latest Project Flag analysis sent to Dillon Read. This analysis contemplated acquisition prices of $50, $55 and $50 per share.

John Mullin of Dillon Read and Krimendahl of Goldman Sachs met on either July 19 or 20. Krimendahl told Mullin that the investment houses really had nothing to discuss, so the conversation was discontinued. Sticht called Waldron and expressed his surprise that more substantive discussions had not occurred.

In the meantime, it was decided that more progress might be made in negotiations with General Cinema if someone other than Smith and Waldron were present at the discussions. Consequently, a meeting was held on July 21st. Present was Smith, Abram Collier, an outside director of General Cinema, Waldron, and Edward Bates, an outside director of Heubelin. The meeting

resulted in no further progress towards a "standstill" agreement. Smith still adhered to certain "non-negotiable" demands that were unacceptable to Heubelin, and expressed his preference for a "swap" involving Heubelin's Grocery Products Division.

On Friday, July 23, Waldron called Smith and made some proposals for structuring a Grocery Products swap. Smith then appeared to change course and express a preference for a stan-still agreement, including the "non-negotiable" terms he had previously insisted upon. Smith also made several comments about the time pressure on General Cinema, and stated that if the agreement could not be reached in a few days General Cinema would have to go back to the market and resume its purchases of Heubelin stock.

After this call, Waldron called Watson and told him of Smith's ultimatum. Both agreed that it was time to approach Reynolds and commence merger negotiations.

Waldron then contacted Sticht, who was in flight to the West Coast. Sticht called Waldron from California that evening. Waldron told Sticht that Heubelin could no longer maintain its independence and suggested that the investment bankers meet and initiate negotiation of a possible merger. Sticht agreed and suggested that the principals get together once he had returned to the East Coast.

On July 26, the investment bankers met in New York and for the first time began to negotiate the price that Reynolds would be willing to pay Heubelin stockholders for their Heubelin stock. No reference to a dollar amount had previously been made

either between the investment bankers or between Heubelin and Reynolds. Sticht and Waldron had discussed, however, Waldron's future and the future of other Heubelin executives, in the event that Heubelin and Reynolds merged.

Prior to the meeting, the Heubelin strategy group suggested that a price in the range of $60 to $65 per share would be fair. The Reynolds group had independently arrived at a $55 per share figure.

During the meeting, Dillon Read proposed a $50-$53 figure. Krimendahl reported to Waldron and Watson that Dillon Read would not go to $55 dollars. Watson told Krimendahl that he would not agree to sell the company for $55. The investment bankers meeting on July 26 ended, therefore, without agreement. That night Sticht called Waldron and suggested that the principals should meet and see if they could

succeed where the investment bankers had failed. Waldron agreed.

On Thursday morning, July 27, Waldron and Watson met with Sticht in New York. By the end of the day the two sides had agreed that they would recommend a price of $60 per share to their boards. The bankers and lawyers were then charged with drafting an agreement that could be taken to the Heubelin and Reynolds boards for approval.

A problem surfaced, however, between Heubelin and Reynolds at the last minute. The issue, raised initially by Reynolds' outside advisors on Tuesday night, was whether Reynolds would have the right to withdraw from a merger agreement if some other person or group succeeded in acquiring 33-1/3% or more of Heubelin's stock before a merger between Heubelin and Reynolds was accomplished.

Under Connecticut law (heubelin is a Connecticut corporation), the acquisition of 33-1/3% of Heubelin's shares by a third party (such as General Cinema) could block the proposed Reynolds/Heubelin Merger. Reynolds wanted the withdrawal right in order to protect itself against the possibility of becoming only an equity investor in Heubelin. Waldron and Krimendahl, Heublein's investment banker, were adamantly opposed to granting Reynolds such withdrawal rights. Reynolds, on the other hand, made it clear that it would not go forward without the right to withdraw.

This impasse was not broken until Thursday morning, July 29th, when Sticht called Waldron and persuaded him to agree to Reynolds' demand despite the fact that Krimendahl remained adamant in his opposition to it. In the meantime, the details of the merger were negotiated; i.e., the

number of shares to be acquired by Reynolds through the initial cash tender, the number to be acquired through an exchange for a package of Reynolds common and preferred stock, and the precise nature of the Reynolds equity package.

At 12:45 p.m. on July 28th, Caspar received a call from the New York Stock Exchange. He was informed that Heubelin's stock was up 2-1/2 points at 47-3/4 with a high volume of trading. The New York Stock Exchange requested that Heubelin issue anotner "no corporate development" statement. Caspar said he would check and call back.

At 1:05 p.m. Caspar called the exchange and stated that he could not issue a "no corporate development" statement because there was a matter "in the works" about which Heubelin was not yet ready to make a statement. Caspar stated that it would be

prudent to have trading suspended in Heubelin's stock. He was told that Heubelin would have to formally request the New York Stock Exchange to stop trading and issue a press release to that effect.

At 1:20 p.m. Caspar again called the New York Stock Exchange and formally requested that the Exchange suspend trading in Heubelin stock. This was accomplished at 1:24 p.m. Simultaneously, Heubelin issued the following release:

> At Heubelin's request, the New York Stock Exchange has suspended trading in the company's stock. There is a matter in mid-stream of development and the company expects to have a statement tommorrow.

That afternoon, Reynolds also requested that trading in its stock be suspended pending an announcement.

On Thursday, July 29th, the merger was approved by the Heubelin and Reynolds boards.

As a result of the merger, the General Cinema takeover was averted. Heubelin retained a large degree of operational automony, and Heubelin's management preserved their positions and their financial security.[13]

DISCUSSION

Count I of the complaint alleges that Heubelin's July 14th statement was materially misleading and that Heubelin's subsequent failure to correct the statement was a "material omission," both resulting in a violation of §10b of the 1934 Act,

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[13] Watson, who resigned as Chairman of Heublein on July 28, was engaged as a consultant through September 30, 1986 for a fee of $600,000. Watson will be entitled to retirement benefits of $64,924 after July 1, 1985. Watson and Waldron were both paid over two million dollars to surrender stock

[Footnote [13] continued on next page]

15 U.S.C. §78j(b), Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, and Section 14(e) of the 1934 Act, 15 U.S.C §78n(e).[14]

[Footnote [13] continued]

> options and performance shares previously granted by Heublein. As a group, all Heublein officers and directors received over fourteen million dollars for the surrender of these shares. Waldron was also granted 2107 shares of Reynolds common and 2107 performance shares. This stock has a potential value of $98,766.

[14] Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> > (a) To employ any device, scheme, or artifice to defraud,

[Footnote [14] continued on next page]

Count II of the complaint charges Reynolds with aiding and abetting Heubelin's violations alleged in Count I. Counts III and IV charge Heubelin with breach of fiduciary duty and common law fraud. The defendants have moved for summary judgment on Counts I and II of the complaint. They have also moved for dismissal of the pendent claims contained in Counts III and IV, should this Court enter

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[Footnote [14] continued]

> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[Footnote [14] continued on next page]

judgment in favor of the defendants on Counts I and II.

[Footnote [14] continued]

> Section 14(e) of the Act applies to tender offers and is worded similarly:
>
> It shall be unlawful for any person to make any untrue statement of a material fact or omit
>
> to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fradulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative.

COUNT I

In order to establish Heubelin's liability under Count I of the complaint, the plaintiff must show that: (1) Heubelin, acting with scienter, (2) misstated or omitted a material fact, (3) that he, the plaintiff, justifiably relied on the misinformation, and (4) that the misinformation caused him to suffer economic injury in the purchase or sale of securities.

The record in this case, and the reasonable inferences drawn from that record, would permit a jury to find that the plaintiff suffered economic harm from selling his stock in reliance on Heubelin's July 14th statement. The record does not support a finding in favor of the plaintiff, however, on the issue of whether Heubelin misstated or omitted a material

fact in violation of the Federal Securities Laws.

The plaintiff alleges four separate violations of §10b, Rule 10b-5, and §14(e):

> (1) Heubelin's failure to disclose material developments in the General Cinema situation;
>
> (2) Heubelin's failure to disclose what is claimed to be an agreement in principle to merge with Reynolds;
>
> (3) The issuance what is alleged to be a false and misleading press release on July 14th;
>
> (4) The failure to correct, modify or rescind the July 14th release in light of subsequent developments that allegedly rendered the release misleading.

In order for a misstatement or omission to violate Rule 10b-5 or Section 14(e), it must be material. Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in

deciding whether or not to sell his stock. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976); Staffin v. Greenberg, 672 F.2d 1196 (3d Cir. 1982).

The Federal Securities Laws do not impose a duty on a corporation to disclose a material fact when it is not trading its own stock. Staffin, 672 F.2d at 1204. A corporation that chooses to issue a statement, however, must include every "material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading...." Rule 10b-5(2). Furthermore, there is a duty to correct a previously truthful statement that has become misleading. Sharp v. Coopers & Lybrand, 83 F.R.D. 343 (E.D. Pa. 1979). Because Heublein was not trading its own stock prior to the issuance of the July 14th statement, it had no duty of disclosure

before that time. Any violation of the Federal Securities Laws by Heubelin, therefore, arises out of the July 14th release and Heubelin's failure to correct that release prior to July 28th.

The plaintiff suggests that Heubelin was required to disclose the following "facts" in the July 14th release or in a subsequent amendatory disclosure: (1) the Reynolds/Heubelin "negotiations" and their "agreement in principle;" (2) the progress of the General Cinema negotiations and General Cinema's "ultimatums," (3) the sale of General Cinema's Miami television station.

THE REYNOLDS-HEUBLEIN DISCUSSIONS

As a matter of law, "preliminary merger discussions" are not material corporate developments, and thus need not be disclosed. A duty to disclose only arises when there is an "agreement in principle"

to merge. Staffin, 672 F.2d at 1205-07. The reason for this rule is that the premature disclosure of such discussions may in itself be misleading, and do more harm than good to a corporation's shareholders. A premature disclosure of preliminary discussions is likely to cause the market price of the target company's stock to rise towards the expected tender price. Because a tender offer must usually be made at a premium above the market price, this rise in market price will push up the price that the acquiring party must offer in order to make the tender offer attractive to the shareholders. This may, in turn, cause the acquiring party to lose interest in the acquisition, causing those shareholders who had purchased shares at a rate inflated by the disclosure of merger discussions to suffer an economic loss when the price of the stock collapses to its pre-disclosure

price. See Staffin, 672 F.2d at 1206-07. It is not difficult, in fact, to imagine such shareholders pursuing an action under Rule 10b-5 on the grounds that the disclosure of the preliminary merger discussions was materially misleading.

After an examination of the record, I conclude that Heubelin was under no duty to disclose its discussions with Reynolds prior to July 28th. I reach this conclusion because there clearly was no "agreement in principle" to merge prior to that time.

It is undisputed that no agreement between Heubelin and Reynolds on the price to be paid for Heublein shares was reached until 5:00 p.m. on July 27th. It is also clear that the parties reached an impasse over Reynolds' demand for withdrawal rights during the evening of July 27th. This impasse was not broken until the morning of

July 29th, shortly before the merger agreement was submitted to the respective boards of directors for approval.

The plaintiff argues that there is a factual dispute as to when an agreement in principle was reached. I disagree. Even after making all reasonable inferences in favor of the plaintiff, it is clear that no "agreement in principle" to merge was formed during the July 9th and 15th meetings between Waldron, Watson and Sticht, or the meeting between the investment bankers that occurred on July 19th or 20th. At none of these meetings was price or the structure of the transaction discussed.

The plaintiff argues that the record supports an inference that Waldron and Watson were basically motivated by a desire to protect their own positions and financial well-being. Thus, he seems to argue, once Sticht made an acceptable proposal as

to the future of Heublein's management team with Reynolds, an agreement in principle to merge existed. The plaintiff alleges that such a proposal was made by Sticht on July 9th, or, at least by July 15th. Assuming that the record would support such a finding as to the motivations of Heublein's top management, I still must conclude that there was no agreement in principle to merge prior to July 27th.

The record is clear that until Waldron called Sticht on July 23rd, HEublein's management had continually expressed their desire to preserve Heublein's independence. The continuing negotiations with Smith of General Cinema and Heublein's exploration of other responses to General Cinema's threat clearly evidence Heublein's commitment to independence. Such a commitment is inconsistent with the existence of an agreement in principle to merge.

While an "agreement in principle" may exist before all of the deatils of a merger have been negotiated, and before the merger is given final approval by the boards of the corporations to be merged, it is clear that agreement on the fundamental terms of the merger must be reached before the merger negotiations become a material corporate development that must be disclosed to the investing public. Without fundamental atreement on the price and structure of a merger, the merger is simply too tentative to give rise to a duty of disclosure. As pointed out in Staffin, the relationship between tender price and market price is critical in a tender offer. The disclosure of merger discussions before an agreement on price has been reached could certainly effect the market price of the stock. This, in turn, would have a great deal of impact on the

tender price. As previously noted, this situation could lead to a collapse of the merger negotiations. Thus, such premature disclosure is not required by the Federal Securities Laws because it is likely to do more harm to the investors than non-disclosure. I find, therefore, that Heublein was not required to make any statement concerning its discussions with Reynolds prior to the agreement between Sticht, Watson adn aldron to recommend a tender price of $60 per share to the respective Heublein and Reynolds boards. It is undisputed that this agreement was not reached until close to 5:00 p.m. on July 27th.[15]

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[15] I need not decide whether Heublein was required to disclose its discussions with Reynolds before trading

[Footnote [15] continued on next page]

THE GENERAL CINEMA SITUATION

The plaintiff argues that in response to the New York Stock Exchange query of July 14, Heublein should have pointed to developments in the General Cinema situation as a possible explanation for the activity in Heublein stock on that day. The plaintiff further argues that Heublein, in order to fulfill its duty to correct the July 14th statement, should have disclosed the deterioration of its negotiations with General Cinema and the threat posed by the sale of General Cinema's Miami television station.

[Footnote [15] continued]

> resumed on July 28th because the plaintiff sold his stock on the afternoon of July 27th. I note, however, that the dispute over withdrawal rights did pose a serious threat to the completion of the merger. This issue was not resolved until the morning of July 29th.

The record is clear that Heublein continued to negotiate with General Cinema until July 23rd. Until that time various possible resolutions of the General Cinema problem were being discussed by Waldron and Smith. While it is true that Waldron steadily became less hopeful about the possibility of negotiating with General Cinema, it was not until July 23rd that he abandoned the idea all together. Requiring diclosure of such tentative negotiations, before any sort of agreement was reached, would contradict the principal set forth in Staffin. As in the case of merger negotiations, premature disclosure of exploratory discussion to resolve a hostile takeover attempt could be self-defeating.

It is also clear that on July 14th, Heublein had no reason to believe that the increased trading in its stock was in any

way related to General Cinema. Caspar and other Heublein executives clearly believed that General Cinema would not be able to resume its purchases of Heublein stock without amending its Schedule 13D statement. Furthermore, there were other rumors circulating at that time concerning a possible takeover bid against Heublein. One in particular concerned a bid by Nestle. Because Heublein was not the source of these rumors it would have been improper for it to have made any comment as to their veracity. The plaintiff, however, has pointed to nothing that could reasonably lead to the conclusion that Heublein connected the increased activity of July 14th to some aspect of the General Cinema takeover bid.

Finally, as to the Miami television station, all that Heublein knew was that Smith had called Waldron on July 14th and

told him that General Cinema was about to make an announcement, but that the announcemetn should not upset Heublein. While Waldron expected that the announcement would concern the sale of General Cinema's Miami station, and while Waldron was not sanguine about the effect of such a sale on the General Cinema-Heublein situation, it is clear that any disclosure of Heublein's suspicions of General Cinema's intention at that point would have had a great portential for misleading investors and disturbing the market. Such a disclosure, therefore, would have been unjustifiable.[16]

I find, therefore, that Heublein was under no duty to make any disclosure as to

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[16] The actual agreement for sale of the station was not made until December, 1982.

developments between itself and General Cinema during the period from July 14th to July 28th.

Because I find that Heublein was under no duty to disclose their negotiations with Reynolds or any developments pertaining to General Cinema Prior to July 28, I will enter summary judgment in favor of Heublein on Count I of the complaint.[17]

COUNT II

In Count II of his complaint, the plaintiff alleges that Reynolds is guilty of aiding and abetting Heublein

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[17] Heublein has also argued that it is entitled to summary judgment because the plaintiff has not been able to produce any evidence that Heublein acted with the requisite scienter to violate the Securities Laws, See Ernst v. Hochfelder, 425 U.S. 185 (1976). Because of the conclusions reached above, I need not address this argument.

in Heublein's violatinos of the Federal Securities Laws. In order to prove this allegation the plaintiff must show, inter alia, that there was an underlying securities violation. Monsen v.Consolidated Dressed Beef Co., 579 F.2d 793, 799 (3d Cir.), cert. denied, 439 U.S. 930 (1978). Because no underlying securities violation has been committed by Heublein, the plaintiff will not be able to make out a case against Reynolds. Accordingly, I will grant summary judgment in favor of Reynolds on Count II of the plaintiff's complaint.

COUNTS III AND IV

The plaintiff concedes that if his federal claims fail, this court will have no jurisdiction to hear the pendent state claims alleged in Counts III and IV. The plaintiff requests, however, that rather than dismissing these claims, I transfer the case to the Court of Common Pleas of

Philadelphia County. The plaintiff cites Weaver v. Marine Bank, 683 F.2d 744 (3d Cir. 1982) as authority to support this request. Because none of the equitable considerations that mandated transfer in Weaver appear to exist in this case, I will deny the plaintiff's request and dismiss Counts III and IV of the complaint.

Finally, the plaintiff has moved for leave to file an amended complaint. The proposed amendments are intended to reflect many of the facts developed during discovery relating to the present motion for summary judgment. Because I have considered these facts in deciding the summary judgment motion, and because I have found that the defendants are entitled to summary judgment, I see no purpose to be served by the filing of an amended complaint. The

plaintiff's motion for leave will, therefore, be denied.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE H. GREENFIELD, et al.	:	CIVIL ACTION
v.	:	
HEUBLEIN, INC., R.J. REYNOLDSINDUSTRIES, INC., and R.J. REYNOLDS TOBACCO COMPANY	:	NO. 82-3463

O R D E R

AND NOW, this 19th day of October, 1983, it is hereby Ordered that:

(1) All claims against the Reynolds Tobacco Company, Inc. are DISMISSED;

(2) Heublein, Inc.'s Motion for summary judgment on Count I of the complaint is GRANTED and judgment is entered in favor of Heublein, Inc. and against the plaintiff on Count I;

(3) Reynolds Industries, Inc.'s motion for summary judgment on Count II of the compalint is GRANTED and judgment is entered in favor of Reynolds Industries, Inc. and against the plaintiff on Count II;

(4) Counts III and IV of the complaint are DISMISSED;

(5) The plaintiff's motion for leave to file an amended complaint is DENIED.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1846

GREENFIELD, BRUCE H., individually and as a representative of a class of persons similarly situated,

Appellants

vs.

HEUBLEIN, INC.,
R.J. REYNOLDS INDUSTRIES, INC., and
R.J. REYNOLDS TOBACCO COMPANY

(D.C. Civil No. 82-3463)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ALDISERT, Chief Judge,
HIGGINBOTHAM and Rosenn,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel June 18, 1984.

On consideration whereof, it is now here ordered and adjudged by this

Court that the judgment of the said District Court entered October 20, 1983, be, and the same is hereby affirmed. Costs taxed against appellants.

ATTEST

Clerk

August 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1846

GREENFIELD, BRUCE H., individually and as a representative of a class of persons similarly situated

vs.

HEUBLEIN, INC.,
R. J. REYNOLDS INDUSTRIES, INC., and
R. J. REYNOLDS TOBACCO COMPANY

Bruce H. Greenfield, et al.,
Appellants
(E.D. Pa. Civ. No. 82-3463)

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER and ROSENN, Circuit Judges.*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

_____
Chief Judge

Dated: October 1, 1984

* Judge Adams did not participate in the consideration of this matter.

** Judge Higginbotham would grant the petition for rehearing for the reasons noted in his dissent.

1934 Act §10(b) (15 U.S.C. §78j(b))

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --

* * * *

(b) To use or employ, in connection with the purchase or sale of any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

SEC Rule 10b-5 (17 C.F.R. §240.10b-5)

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which oeprates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

1934 Act §14e (15 U.S.C. §78n(e))

(e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offier or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

NO.

IN THE

SUPREME COURT FOR THE UNITED STATES

OCTOBER TERM 1983

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

CERTIFICATE OF SERVICE

It is certified that, pursuant to Rules 19 and 28 of this Court, on December 27, 1984, ALEXANDER D. BONO, ESQUIRE, a member of the bar of this Court, caused three copies of the Petition for Writ of Certiorari in the above case, together with three copies of the Appendix to the Petition, to be served on counsel

for the respondents as follows:

(1) by hand delivery to:

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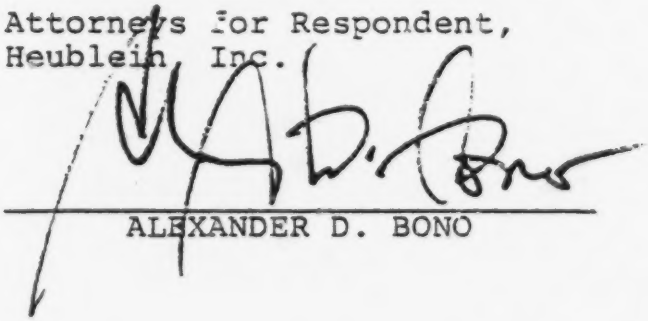

ALEXANDER D. BONO

No. 84-1025

Office-Supreme Court, U.S.
FILED
JAN 28 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

v.

HEUBLEIN, INC.

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Questions Presented

(1) Does a corporation which is not buying or selling its own securities have an obligation under the federal securities laws to disclose preliminary contacts with a possible merger partner, where there have been no negotiations regarding the price of any proposed merger?

(2) Did the District Court and Court of Appeals err in holding that it was not false or misleading for a corporation:

(a) to respond to an inquiry from the New York Stock Exchange that it was aware of no corporate development that would explain the activity in its stock on a particular day where the undisputed evidence was that such response was accurate?

(b) to decline to speculate publicly that a leak or rumor was causing the activity, when the corporation was not responsible for any leak or rumor?

(3) Did the lower courts err in holding that in the circumstances of this case the ebb and flow of discussions between a corporation, which was not buying or selling its own securities, and a perceived raider did not constitute a material fact and was not required to be disclosed?

The Parties

This statement is submitted pursuant to Rule 28.1 of this Court. Heublein, Inc. ("Heublein") is a wholly owned subsidiary of R. J. Reynolds Tobacco Company, a New Jersey corporation, which in turn is a wholly owned subsidiary of R. J. Reynolds Industries, Inc., a Delaware corporation ("Reynolds"). Neither Heublein nor Reynolds has any subsidiaries or affiliates which have any publicly held securities.

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No. 84-1025

IN THE

Supreme Court of the United States

October Term, 1984

BRUCE H. GREENFIELD, individually and as a representative of a class of persons similarly situated,

Petitioner,

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HEUBLEIN, INC.

and

R. J. REYNOLDS INDUSTRIES, INC.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Heublein, Inc. ("Heublein") and R. J. Reynolds Industries, Inc. ("Reynolds") respectfully request that this Court decline Bruce H. Greenfield's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Statement of the Case

This petition arises out of the affirmance by the Court of Appeals of the dismissal of a securities action brought against Heublein and Reynolds by Greenfield, a former Heublein shareholder. Greenfield sold his Heublein stock on July 27, 1982, shortly before the announcement on July 29, 1982, of a tender offer for Heublein shares by Reynolds and a proposed merger thereafter between Heublein and a Reynolds' subsidiary. Greenfield claimed that a Heublein press release issued on July 14, 1982, should have disclosed the possibility of such a tender offer and merger, as well as certain discussions between Heublein and a third company, General Cinema Corporation ("General Cinema"), which owned 18.9% of Heublein's stock. Greenfield claimed that the press release was false and misleading, and that Reynolds had aided and abetted Heublein's alleged violations by remaining silent when the statement was issued. The District Court granted respondents' motion for summary judgment, and the Court of Appeals affirmed.

Greenfield's statement of facts makes no reference to the opinions of the District Court and the Court of Appeals, and in numerous instances distorts the record below by use of partial and out-of-context quotations. The facts as recited by the lower courts are virtually undisputed.* The decisions below were rendered upon a full record. Prior to the filing of respondents' motion for summary judgment, Greenfield had deposed all the executives of Heublein and Reynolds who had been involved in the events giving rise to

* Where there were disputed facts both the District Court and the Court of Appeals viewed them, on this summary judgment motion, in the light most favorable to plaintiff.

the action. Greenfield also sought and obtained relevant documents from respondents and from the New York Stock Exchange. Accordingly, the lower courts had before them all those facts from discovery which bore on plaintiff's claim.

1. The General Cinema Acquisitions of Heublein Stock

The chain of events of interest in this action began with large acquisitions of Heublein stock by General Cinema. Between November 18, 1981 and February 1, 1982, General Cinema made open market purchases of 2.1 million shares of Heublein stock, just under 10% of the shares then outstanding. In a Schedule 13D filed with the Securities and Exchange Commission on February 3, 1982, General Cinema disclosed its purchases, stating that the shares had been purchased "for investment only." At the same time, however, General Cinema stated that it intended to increase its ownership of Heublein to more than 15% and to make a Hart-Scott-Rodino filing which would enable it to buy up to 49.9% of the shares outstanding.

Heublein opposed General Cinema's actions. It established a high level executive group "to look into ways of defusing the General Cinema moves." (A4).* Included in the strategy group were Watson (Heublein's Chairman), Waldron (President), Caspar (General Counsel), and Gillespie (who functioned as chief of staff), as well as several others.

Among the early defensive steps taken by Heublein were the initation of suit against General Cinema and pur-

* References in this form are to the Appendix filed by Petitioner. References in the form "(JA ——)" are to the Appendix filed in the Third Circuit.

chase by Heublein of General Cinema stock. In addition, Heublein pursued negotiations with General Cinema looking to either a standstill agreement or an asset swap. From the beginning the Heublein group knew that one conceivable option was to seek a white knight, *i.e.*, to sell the company to a friendly suitor. As Watson testified, it was, however, clearly understood by the Heublein Board and by Waldron and Watson that they would "fight to the end . . . before [they] became a party to any sale of the company," whether to General Cinema, a white knight, or anyone else. (JA1340). The white knight alternative was repugnant to Heublein which fully intended to remain independent; selling the company to anyone would only be considered as a last resort. In accordance with this understanding, Waldron and Watson did not permit the subject of a white knight even to be discussed at the strategy group meetings. Instead, they actively pursued other, less drastic alternatives for solving the General Cinema problem.

In the meantime, Reynolds had become interested in acquiring Heublein. In May, Reynolds began a confidential study of that possibility. Thereafter, Reynolds' management concluded that Heublein was an attractive acquisition possibility, but that Reynolds should not become embroiled in any bidding contest to gain control of Heublein. (A4). Reynolds' Chairman, Sticht, advised Waldron in June that Reynolds would take no hostile action against Heublein, but that Sticht was interested in Heublein joining Reynolds. Waldron replied that Heublein intended to remain independent and he believed strongly that the company would be able to do so.

In early June, General Cinema announced that it had acquired 18.9% of Heublein stock, and that it had stopped

buying Heublein stock for the time being. Thereafter, Heublein and General Cinema continued their discussions looking toward a standstill agreement. By July 7, 1982, Waldron felt that he and Smith, General Cinema's Chairman and President, were very close to a standstill agreement. However, on July 8, Smith called Waldron and radically changed his position, demanding that the standstill include terms which he knew were unacceptable to Heublein and which he called "non-negotiable." (A50).

2. The July 9 Meeting

Concerned over General Cinema's continually shifting position, Waldron decided it might be prudent to follow up on his June discussion with Sticht. Waldron called Sticht who agreed to meet in Connecticut on Friday, July 9. Waldron and Watson decided that it was premature to discuss this meeting with other members of Heublein's management and they did not tell the strategy group as a whole about the planned meeting. The only people informed of the decision to meet with Sticht were Caspar and Gillespie of Heublein, McNally (Heublein's outside counsel), Krimendahl (Heublein's investment banker) and Fleischer (counsel to the investment banker). Waldron told these persons that the sole purpose of the meeting was to become acquainted and not to open negotiations with Reynolds; he further told them to keep the fact of the meeting strictly confidential. (JA1421-24).

At the meeting with Sticht, Waldron opened the discussion by explaining that he and Watson wanted to learn more about Reynolds, but not to negotiate a possible combination. He reiterated that Heublein intended to remain an independent company and asked for and received Sticht's

confirmation that the meeting would not lead to any hostile action by Reynolds against Heublein. Sticht spent most of the time describing Reynolds' management philosophy. At the end of the meeting, Waldron and Watson thanked Sticht for coming but reiterated that Heublein had no interest in joining Reynolds if it could find any other solution to the General Cinema problem. As the Third Circuit found, confirming the finding of the District Court (A81), "no formal understanding or agreement was reached" at that meeting. (A5). Following the meeting, Gillespie, Krimendahl, McNally, and Caspar of the Heublein strategy group were informed of the discussions.

3. Heublein's July 14, 1982 Release

Just prior to the close of the market on Wednesday, July 14, a representative of the New York Stock Exchange called Caspar and told him that Heublein's stock was up 3⅞ dollars to $44 on a trading volume of 235,000 shares. The Exchange inquired whether Heublein would issue a "no corporate development" statement. (JA1373). Caspar responded that Heublein had no knowledge of a material corporate development and that he was in a position to know, but that he would double check and get back to the Exchange. (JA1374). At the time he made this response, Caspar knew about the meeting with Sticht that had occurred on July 9, was confident that that information about the July 9 meeting had not been leaked by any of the four Heublein representatives or the three outside advisors who had knowledge of it, and furthermore knew that in any event, given the nature of the meeting, it was not a material corporate development. (JA1378-79, 1381- 2).

Caspar was also aware of the pattern of trading on July 14. (JA1396). At 10:30 that morning, shortly after the market opened, a 100,000 share institutional trade had been made without any significant change in price. At 2 P.M. that afternoon a total of only 153,800 shares, including that 100,000 share block, had been traded. At that point, the stock was only up 5/8ths of a point from $40\frac{1}{8}$ to $40\frac{3}{4}$. It was only in the last hour of trading that the stock moved up to $44 on a closing volume of 242,500 shares. Caspar had no idea what caused the later price and volume activity. (JA1382, 1397-99).

Based on the advice of Heublein's outside advisors, Caspar believed that General Cinema could not resume its purhases of Heublein stock without first amending its Schedule 13D, the last amendment of which had disclaimed the present intention to purchase more Heublein stock.* Caspar believed that the only possible explanation for the trading activity lay in other rumors circulating in the market, especially one concerning a possible Nestle takeover bid, which in fact never materialized and was in any event known to the Exchange. (JA486). This rumor, of course, was not a Heublein corporate development.

After his initial discussion with the Exchange, Caspar discussed the situation with Gillespie and McNally, both of whom knew about the July 9 meeting with Sticht (both Waldron and Watson were unavailable that afternoon). Caspar, Gillespie and McNally agreed that the July 9 meet-

* Caspar was correct in dismissing the possibility of purchases by General Cinema as the cause of the market activity; the Exchange contacted General Cinema on July 14 and confirmed that General Cinema was in fact not in the market. (JA484-86). Even if it had been, General Cinema purchases unbeknownst to Heublein could not have been a Heublein corporate development.

ing was not a corporate development and did not require disclosure. Caspar then drafted a statement with which McNally as an outside counsel and Gillespie concurred. As reported by Dow Jones, the statement read:

> "A spokesman for Heublein, Inc. said the company was aware of no reason that would explain the activity in its stock in trading on the New York Stock Exchange today."

Waldron, who was out of the office when the Stock Exchange called, reviewed the statement the next morning before the Stock Exchange opened and was in complete agreement with what was said.*

4. The Events of July 15-23

Heublein had an additional preliminary meeting with Reynolds on the evening of July 15. This meeting was set up in the morning of July 15 and took place that evening.** Waldron began the meeting as he had on July 9, stating that the purpose of the meeting was a "what if" discussion, since Heublein was still hopeful of fending off General Cinema. Again, no negotiations took place, and both of the courts below found, based on a full record of the testimony of all participants, that no discussion, much less agreement, as to price occurred at this meeting. (A6, A80-81).

Subsequent to the meeting of July 15, Waldron and

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* The price of Heublein stock did not decline after the press release, but remained in the range of $42½-45¼ for the next two weeks. Indeed, Greenfield sold his stock on July 27 at $45.25, higher than the stock had traded on July 14 or 15.

** Greenfield asserts, without record citation, that the call to set up the meeting took place on July 14 (Pet. Br., p. 7). The record is undisputed, however, that Waldron called Sticht on July 15, and suggested a meeting for the following week. (JA1139). Sticht then suggested that the meeting take place that evening. (JA1006-07).

others at Heublein continued to negotiate with Smith and others at General Cinema.* A meeting took place on July 21, and telephone conversations continued through Friday, July 23, at which time Waldron finally became convinced that he could not reach agreement with Smith. While leaving the discussions open with Smith, Waldron and Watson decided on that date that they should seriously consider beginning negotiations with a white knight. Thus on the afternoon of July 23, Waldron contacted Sticht and suggested that the Heublein and Reynolds investment bankers meet to begin discussing a possible merger.

5. The Merger Negotiations and Announcement

On Monday, July 26, the two investment bankers met in New York City. These were the first discussions between Reynolds and Heublein or their investment bankers concerning a price Reynolds might pay for Heublein shares if the companies were to combine. At the end of a day of negotiating, the parties were $12 a share apart—Reynolds at $53, Heublein at $65. When multiplied by the shares outstanding, this was a $260,000,000 difference. Faced with this impasse, the principals decided to meet personally.

On the next day, Tuesday, July 27, Sticht and Abely of Reynolds and Waldron and Watson met to begin the dis-

* On the morning of July 14, Waldron had received a telephone call from Smith of General Cinema who told Waldron that General Cinema was about to make an announcement, but it should not in any way be upsetting to Heublein. Waldron surmised—but was not told by Smith—that the planned announcement involved the sale of General Cinema's Miami television station (JA1144-46). Waldron feared that General Cinema could then be in a position to use the very substantial proceeds of such a sale eventually to buy more Heublein stock. The sale in fact did not take place until many months later; the agreement was not made until December, 1982, and the sale was closed shortly before March 15, 1983. (A88).

cussions anew. At the end of that second day, the parties were finally able to agree to a melded price of $60 for a combined tender offer and merger transaction. Late that afternoon, the bankers and lawyers were summoned and charged with seeing that the crucial step was initiated—structuring the transaction to ensure its acceptance in the marketplace, which involved among other things determining the price and number of shares to be bought in the tender offer, and valuing the securities to be offered on the back-end.

At that point, the parties immediately ran into serious problems over the structure of the transaction. Reynolds insisted on a right to withdraw if anyone succeeded in acquiring 33% or more of Heublein stock before the proposed merger occurred since such a person or group could block the merger under Connecticut law. This was not an unrealistic possibility as General Cinema already owned 18.9%, and would be free to purchase shares during the twenty-day period during which Reynolds would be precluded from beginning its purchase of Heublein shares pursuant to the tender offer. This dispute remained unresolved as the lawyers and bankers worked to put the rest of the transaction together.

On Wednesday, July 28, the New York Stock Exchange called Heublein at midday and advised Caspar that Heublein stock was up 2½ points and trading at 47¾. It requested that Caspar issue a "no corporate developments" release. Caspar stated that he could not make such a release because there was a matter in midstream about which Heublein was not in a position to make a statement. The release issued by Heublein at 1:20 P.M. stated:

> "At Heublein's request, the New York Stock Exchange suspended trading in the company's stock. There is

a matter in mid-stream of development and the company expects to have a statement tomorrow."

On Wednesday, July 29, special meetings of the Reynolds and Heublein Boards approved the proposed acquisition. Just prior to the meeting of the Heublein Board, Waldron, over the objection of the investment banker, had agreed to the Reynolds condition calling for withdrawal rights if another party acquired 33⅓%. At the conclusion of the meetings, the merger was publicly announced.

ARGUMENT

I.

The courts below properly enunciated and applied the principles of law governing corporate disclosure.

The courts below held that on the facts of this case, there was no affirmative duty of disclosure for Heublein to set forth its preliminary contacts with Reynolds prior to July 27, and that its July 14 press release was not false and misleading. The principles of law enunciated by the courts were correct and in accord with the principles announced by the other Circuit Courts which have addressed these questions.

A. Heublein Had No Independent Duty of Disclosure of its Preliminary Contacts with Reynolds

The courts below held that for an affirmative duty to disclose to arise in the context of merger negotiations, the parties must have reached an agreement in principle (A11; A78-79). Both courts concluded that no agreement in principle had been reached prior to the time Greenfield sold his

stock, because there had been no agreement between Reynolds and Heublein as to price and structure. (A12; A81).

Petitioner does not contend that the standard of an "agreement in principle," previously adopted by the Third Circuit in the context of preliminary merger discussions (*Staffin* v. *Greenberg*, 672 F.2d 1196 (3d Cir. 1981)) is incorrect (Pet. Br., pp. 29-32). Nor does Petitioner contend that there is any conflict in the Circuits on this issue.* Rather he argues only that the application of the standard to the facts of this case was incorrect.

The Court of Appeals fully considered Greenfield's argument that an agreement in principle should not be governed by the determination of whether there was agreement on price and structure. It was clear on the record below that price had not been discussed, much less agreed to, prior to the time that Greenfield sold his stock. (A13; A84). In rejecting Petitioner's argument that this should not be determinative, the Third Circuit pointed out that "merger negotiations arise in a wide variety of circumstances and the standard used to determine when disclosure of these is required must be both flexible and specific." (A12). The court noted that price and structure "are typically critical aspects of any merger" and that agreement on these matters "provides concrete evidence of a mature understanding between the negotiating corporations." (A13). Furthermore, this test permits a corporation to make a sensible determination of when disclosure is appropriate as it "constitute[s] a usable and definite measure for determining when disclosures need be made."

* The Second Circuit adopted a comparable standard in *Reiss* v. *Pan American World Airways, Inc.*, 711 F.2d 11 (2d Cir. 1983).

(A13). Finally, the court pointed out that "with both price and structure agreed to, there is only a minimal chance that a public announcement would quash the deal or that the investing public would be misled as to likely corporate activity." (A13).

Petitioner argued below and argues here that in this particular transaction questions of price and structure were not really significant. This argument, which is without support in the record, was rejected by both the District Court and the Court of Appeals.* Indeed, the dissent in the Court of Appeals agreed that no agreement in principle had been reached as a result of Heublein's initial contacts with Reynolds. (A20).

As the Third Circuit stated, the adoption of the subjective "intent of the parties to merge" standard suggested by Petitioner would be inappropriate:

> "Such a standard would leave both courts and corporations with insufficient guidance to determine when disclosure of merger negotiations should be made. This uncertainty, coupled with the possibility of substantial liability for tardy disclosure, would likely result in corporations issuing early public statements announcing the details of all merger talks. Not only would this have a disruptive effect on the stock markets, but, considering the delicate nature of most merger discussions, might seriously inhibit such acquisitive ventures." (A12).

* Petitioner bravely tries to dismiss the failure to reach agreement on July 26 on the question of price as simply a charade and unimportant (Pet. Br., pp. 11-12). He fails to note that at the close of the day, the parties were approximately $12 a share apart or approximately $260,000,000. It was only by dint of all-day negotiations the next day that the agreement was reached.

The Circuits which have addressed this matter have likewise concluded that preliminary merger negotiations such as involved here are immaterial as a matter of law. *See Staffin* v. *Greenberg, supra,* 672 F.2d at 1206; *Susquehanna Corp.* v. *Pan American Sulphur Corp.,* 423 F.2d 1075, 1084-85 (5th Cir. 1970). The reasoning behind these decisions has been explicated by the Second Circuit in *Reiss* v. *Pan American World Airways, Inc.,* 711 F.2d 11 (2d Cir. 1983), in which the Court stated:

> "Such negotiations are inherently fluid and the eventual outcome is shrouded in uncertainty. Disclosure may in fact be more misleading than secrecy so far as investment decisions are concerned. We are not confronted here with a failure to disclose hard facts which definitely affect a company's financial prospects. Rather, we deal with complex bargaining between two (and often more) parties which may fail as well as succeed, or may succeed on terms which vary greatly from those under consideration at the suggested time of disclosure. We have no doubt that had Pan Am disclosed the existence of negotiations . . . and had those negotiations failed, we would have been asked to decide a section 10b-5 action challenging that disclosure. . . .
>
> * * *
>
> Plaintiffs will at best be able to prove that Pan Am failed to disclose the negotiations with National because it feared that disclosure would be misleading under the circumstances or would adversely affect the negotiations themselves. In neither case are investors well served by a rule compelling disclosure. *See Staffin, supra.*" *Id.* at 14.

It should be noted that Respondents argued below, based on the *Staffin* case in the Third Circuit and on *Securities & Exchange Commission* v. *Texas Gulf Sulphur Co.,* 401 F.2d

833 (2d Cir. 1968), *cert. denied,* 394 U.S. 976 (1969), that so long as Heublein was not itself trading in its own securities, it had no independent duty to disclose its preliminary meetings with Reynolds. Thus, putting aside the question of whether an agreement in principle was reached, no duty of disclosure existed. This is a separate ground on which the judgment below should be upheld.

B. The Court Below Found the Press Release Not Misleading Under Established Legal Principles

Petitioner contends that certiorari should be granted to resolve a supposed conflict in the Circuit Courts with respect to the standard for determining whether a press release is misleading. However, this argument can only be made by completely ignoring the opinions below.

The courts below followed well-established legal principles, as to which there are no conflict, in holding that "although a corporation may be under no duty to disclose information, if it voluntarily chooses to make a public statement such a statement may not be 'false or misleading or . . . so incomplete as to mislead. . . ,' " quoting the Second Circuit in *Securities & Exchange Commission* v. *Texas Gulf Sulphur Co., supra,* 401 F.2d at 862. (A15-16). Thus, the Third Circuit is fully in accord with the Second Circuit and every other Circuit that has considered this issue with respect to the proper legal standard. Petitioner's quarrel with the Third Circuit and District Court decisions comes down to a dispute as to whether, on the facts of this case, the press release issued by Heublein on July 14 was misleading or not.

Indeed, Greenfield can find nothing wrong with Heublein's July 14 statement that "the Company was aware of

no reason which would explain the activity in its stock in trading on the New York Stock Exchange today." He admits that such statement was literally true (Pet. Br., p. 17), but suggests that the Company was under a duty to investigate and to determine the reason that would explain the activity. Greenfield suggests that there could have been a leak of either the July 9 Reynolds meeting or the state of the General Cinema negotiations. He also suggests that Heublein should have issued a press release which disclosed such possibilities, and in essence would constitute the Company's speculation as to the reason for the increased trading.

Despite full discovery below, Greenfield was unable to point to any evidence that there was in fact a leak, or that any leak was responsible for the increased trading, or that Heublein had any information which would suggest that such was the case. As the Court of Appeals stated, despite full discovery, Greenfield "alerted the district court to no evidence which might tend to prove, that any of the details of these discussions . . . had been recently leaked." (A17). From Heublein's perspective, the one meeting with Reynolds had been kept in the greatest confidence. Only the two chief officers of the Company, Waldron and Watson, and two other high officers, Gillespie and Caspar, were even aware of the July 9 meeting. The only other persons aware of it were the three outside advisors, and each had been advised of the strict confidentiality of the matter.*

* Greenfield refers to the New York Stock Exchange Manual which describes the problem of confidentiality when "outsiders" are brought in to conduct studies or assist in preparing for contemplated transactions. (Pet. Br., p. 24). This comment refers to a different situation than obtained here; no outsiders had been asked to conduct studies, and no one was involved in putting together merger documents or the like. Three individuals with the closest possible confidential relationship to the Company had simply been advised of a meeting.

There was no evidence below that Heublein was in any way responsible for any leak or for any rumor. In such circumstances the Second Circuit has repeatedly ruled that under the federal securities laws, a corporation is under no duty to verify or correct a rumor which is in no way attributable to it. *See State Teachers Retirement Board* v. *Fluor Corp.*, 654 F.2d 843, 850 (2d Cir. 1981); *Elkind* v. *Liggett & Myers, Inc.*, 635 F.2d 156, 163 (2d Cir. 1980); *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 949 (2d Cir. 1969). Greenfield points to no conflicting authorities.

Put another way, there were no material facts for Heublein to disclose on July 14, as to which nondisclosure made the release materially misleading. The Court of Appeals stated:

> "As we have previously established, on July 14, Heublein was under no duty to disclose, and had not dislosed, the substantive elements of its discussions with either Reynolds or General Cinema. Each discussion was in a preliminary stage and no 'agreement in principle,' or any functional equivalent thereof, had been reached." (A17).

There were thus no material facts to disclose and speculation by Heublein regarding market rumors as to which it knew no more than did the Exchange or the market would have been improper.' (See A86-88).

Greenfield attempts to construct an argument from the reference in the New York Stock Exchange Manual to calls by the Exchange regarding developments "which could be responsible for unusual market activity." (Pet. Br., p. 23). No court has interpreted the use of "could" rather than

"would" in that sentence as an invitation for a company to speculate, without factual basis, regarding movements in its stock; as noted above, the Second Circuit has on several occasions rejected placing any such obligation on a listed company. Moreover, the record below is clear that the request made to Caspar was not to speculate, but to advise the Exchange whether there were any material corporate developments or not.*

Finally, what Greenfield's argument comes down to is the suggestion that this Court should take certiorari in order to announce a rule that in certain circumstances where there has been a preliminary meeting, a company should either disclose the details of those inchoate discussions or issue a no-comment statement in response to a Stock Exchange inquiry. Such a rule would be inappropriate on the facts of this case and could not comprehend the myriad factual situations in which corporate disclosure problems arise.

The first alternative would require public companies to disclose delicate discussions any time that market activity in its stock changes suddenly, whatever the reason, even where the company did not cause or know of the cause of the activity. Such a rule would place public corporations in the untenable position of making premature announcements that could expose the company to 10b-5 actions if the

* The entire record on the subject consists of Caspar's testimony:

"Q. Would you give me, please, your recollection of what was said in that conversation in as much detail as you can recall?

A. As I recall it, the call came at the end of the trading day, shortly before the New York Stock Exchange closed at 4 o'clock and the call came from Mr. Conneally I believe. . . .

And he wanted to know if we could issue a No Corporate Development Statement." (JA1373).

negotiations fell through. *Reiss* v. *Pan American World Airways, Inc., supra,* at 14. Furthermore, as the court in *Staffin* v. *Greenberg, supra,* 672 F.2d 1196, expressly recognized, the act of disclosure could itself jeopardize the successful conclusion of pending negotiations, and thereby greatly increase the risk that all shareholders, not just those who speculated on the possibility of a merger, would be injured. *Id.* at 1206.

The other proposed alternative—that Heublein should have said "no comment"—carries with it the implication that if such a statement had been issued, Greenfield would have guessed that there was a material corporate development and would not have sold his Heublein stock. There are numerous reasons why such a general rule would be inappropriate. First, a no-comment response would not have answered the Exchange's inquiry, an inquiry to which Heublein made a conscientious effort to respond. Second, given Greenfield's interpretation of the meaning of "no-comment"—that is, as suggesting that there was a material corporate development brewing—such a statement would have elevated what was not a material corporate development into just that. Indeed, in contrast to the measured and objective response which was in fact made, a no-comment response would likely have fanned the flames of speculation with all the attendant damage to shareholders which has been referred to by numerous courts. *See, e.g., Reiss* v. *Pan American World Airways, Inc., supra,* 711 F.2d at 14; *Staffin* v. *Greenberg, supra,* 672 F.2d at 1206-07.

II.

The lower courts properly applied the *Northway* test of materiality.

Finally, Greenfield argues that the Circuit Court applied an improper standard of materiality, and therefore failed to appreciate that the "breakdown" of General Cinema-Heublein discussions on July 23 rose to the level of a material fact which should have been disclosed. This argument is totally specious, both in its analysis of the standard applied by the court and its application to the facts.

The Circuit Court rejected Greenfield's argument regarding the materiality of the July 23 events as follows:

> "Failure to agree is not the negative equivalent of an agreement in principle. If parties reach an agreement in principle, they formally change their relative positions; if they fail to reach such an agreement, they are simply left in the same positions they would have been had no negotiations taken place. Thus, while an agreement in principle to merge, as a matter of law, constitutes a material corporate development requiring public disclosure, the failure to agree may well constitute no development at all, only, at best, a foregone opportunity. Such was the case here. Both before the negotiations began and after they were abandoned General Cinema . . . was, at least implicitly, in a position to increase that stake through continued open market purchases. Both before and after, Heublein considered these purchases to represent hostile action and was pursuing strategies designed to block General Cinema's takeover activity." (A15).

Greenfield focuses on the next sentence of the opinion which states that the breakdown of the negotiations "did not materially change the relative positions of either corporation. . . ." He suggests that the court should have focused not on the corporations' positions but on the expectations of the shareholders, and that the failure to do so was a repudiation of this Court's decision in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). Again, like his argument regarding "could" and "would", Greenfield's argument amounts to playing with words and has no substance.

The basic thrust of the *Northway* decision was a rejection of a subjective standard of materiality—phrased in terms of what "*might* have been considered important by a reasonable shareholder" (*Id.* at 447) (emphasis added) —in favor of the objective standard that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." (*Id.* at 449). The Third Circuit clearly looked upon the test of materiality as an objective one. It is evident that in focusing upon the fact that, as a result of the July 23 discussions, there was no actual change in the corporations' positions, the Third Circuit was applying such a standard. If there was no actual change in the corporations' positions—that is, they were still in disagreement, as they always had been—there could hardly have been, from an objective viewpoint, any new material fact regarding those positions that needed to be disclosed. There was no error in the lower court's application of the materiality standard.

Numerous other considerations support the holding that Heublein was correct in not issuing a press release describing its July 23 discussion with General Cinema. To begin with, since Heublein was not in the market, there was no affirmative duty of disclosure.* Moreover, there was in fact no formal breakdown of talks. All that happened was that Waldron unilaterally became exasperated with General Cinema and decided to pursue serious discussions with Reynolds. If the Reynolds discussions had not resulted in a transaction, there is no reason why Waldron could not have picked up his discussions with General Cinema where they had been left on July 23. To require disclosure of the inconclusive July 23 discussions between Heublein and General Cinema would have violated the teaching of cases such as *Reiss* v. *Pan American Airways, Inc., supra,* 711 F.2d 11, that disclosure of fluid negotiations "may in fact be more misleading than secrecy." *Id.* at 14.

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* The state of the public record with respect to Heublein *vis-a-vis* General Cinema was in no way misleading. General Cinema had purchased 18.9% of Heublein stock; had stated in a Schedule 13D in early June that it had ceased purchasing Heublein stock pending discussions with Heublein; and had further reserved the right in that Schedule to resume purchases if it did not reach agreement. Neither General Cinema nor Heublein had subsequently issued releases reporting the ebb and flow of the subsequent negotiations. For General Cinema to resume buying, it would have been required to amend its Schedule 13D, thereby giving notice to shareholders.

Conclusion

For the foregoing reason, Greenfield's petition for a writ of certiorari should be denied.

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Respectfully submitted,

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